Nos. 18510 to 18533, 18865 to 18872

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED AIR LINES, INC.,

Appellant,

vs.

JANICE WIENER *et al.* (24 cases); CATHERINE B. NOLLENBERGER *et al.* (7 cases); UNITED STATES OF AMERICA (31 cases),

Appellees.

OPENING BRIEF OF APPELLANT UNITED AIR LINES, INC.

(Appendix in Separate Volume.)

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Preliminary Statement.

This opening brief is filed by appellant United Air Lines, Inc. (hereinafter designated "United") in the above-numbered 31 appeals heretofore consolidated for purposes of briefing and argument by order of this Court filed on May 27, 1963.

All 31 of the cases giving rise to the appeals in question arose out of a common occurrence: a mid-air collision between a DC-7 propeller driven commercial airliner owned and operated by United and an F-100F United States Air Force jet fighter airplane. The collision occurred on April 21, 1958, near the City of Las Vegas, Nevada. There were no survivors.

All of the actions were brought under the Nevada Wrongful Death Statutes: Nev. Rev. Stats. §§ 12.090, 41.080, 41.090. In all 31 cases, the plaintiffs' de-

cedents were passengers for hire on the DC-7; in 9 of them, they were also government employees travelling in line of duty as such. United was a defendant in all 31 actions, the United States of America (hereinafter designated "the Government"), being a co-defendant in the 22 nongovernment employee cases. In 5 of the 9 government employee cases, the Government, as a co-plaintiff, sued United as a statutory subrogee in enforcement of its lien rights under the Federal Employees' Compensation Act: 5 U.S.C. §§ 751 et seq., 776. In the 22 nongovernment employee cases, United and the Government each, by cross-claim, sought, in the alternative and by way of relief over, contribution or indemnity as against the other. In the 9 government employee cases, United was denied the right to seek relief over as against the Government.

Twenty-four of the cases (Wiener, et al., Nos. 18510-18533 here) which will sometimes hereinafter for convenience be referred to as "the *Wiener* cases," were initially tried together, on a consolidated basis. All of these, including the 2 government employee cases which were included therein, were tried to a jury as to United, the 22 nongovernment employee cases embodied in this group being tried to the same jury, on an advisory basis, followed by the court's findings, as to the Government. The cross-claims of United vis-a-vis the Government were tried to the Court.

After the trial of the above-mentioned 24 cases, the 7 other cases (Nollenberger, et al., Nos. 18866-18872 here) which were then pending against United in the United States District Court of Nevada, were, by stipulation and in effect *forum non conveniens,* transferred to the court below, the United States District Court for the Southern District of California. These 7 cases

will sometimes hereinafter be referred to for convenience as "the Nevada cases"; they were all government employee cases and they included the five cases in which the Government sued as a co-plaintiff. In these 7 cases, which were, subsequent to the transfer, tried together, the court below granted motions for summary judgment against United as to the issue of liability. As a result, the actual trial, which was had to a jury other than that previously empaneled in the *Wiener* cases, was limited to the issue of damages in each case. In two of these 7 cases the court increased, by substantial amounts, the amount of damages returned by the respective verdicts.

Judgments in favor of the plaintiffs and against United were rendered in all 31 cases. Judgments in favor of the plaintiffs and against the Government were rendered in the 22 nongovernment employee cases; and in these latter actions indemnity was denied and contribution allowed as between United and the Government, each as against the other in amounts as computed in Part I of the Appendix hereto. Said Part I also sets out the detail, case by case, as to the matters hereinabove sketched in broad outline, as well as other particulars. Following entry of the judgments in the several cases and after denial of its motions for new trial therein, United instituted the present appeals, bringing up a complete original record as to all cases.

Record Citations and Abbreviations—the Appendix.

As a further preliminary, a few remarks with reference to the record are in order. It will be found that the *Wiener* case, No. 18510 here, was treated in effect as the leading case below as to the issues of liability in favor of the plaintiffs and of indemnity or contribution as between United and the Government

as joined in the 24 cases originating in California: the *Wiener* cases. Aside from formal individual pleadings, practically all of the filings material to those 24 cases will be found in *Wiener*. For this reason, all record references herein which are abbreviated as "R.", followed by a page number, will be understood to refer to the record in *Wiener* but as connoting also a reference which is material to all of the appeals in the *Wiener* group of cases.

On the other hand, citations to the record in each individual case, both as regards jurisdictional matters and other matters material to the discussion contained in the brief, will be found in Part II of the Appendix hereto.

Reference to specific findings made by the court below will be abbreviated to "F.", followed by the appropriate number of the finding or findings ("FF.") and the appropriate record citation.

As for the reporter's transcript, proceedings at trial of the issues of liability and contribution or indemnity, which issues were tried only in the *Wiener* cases,* will be given by volume and page, thus: "24 Rep.Tr. 3168."

The Appendix hereto, which is being filed herewith as a separate volume, embodies five parts, thus: I, names, by plaintiffs, and number of each case; amounts of recovery by plaintiffs; amounts of contribution allowed as between the Government and United; cases by groups; II, record references to the

*There was no trial as to either of these issues save in the *Wiener* cases. As earlier noted, the District Court granted motions for summary judgment as to the issue of liability in the 7 Nevada cases and it denied United the right to seek indemnity in the government employee cases, which included all of the Nevada cases and, as well, two of the *Wiener* cases.

pleadings and other portions of the several records showing the existence of jurisdiction and other pertinent record citations; III, text of pertinent statutes; IV, jury instructions, *totidem verbis,* given and refused and referred to in the Brief; V, record references to documents applicable to the District Court's additur to the jury verdicts in the Nollenberger and Matlock cases; VI, reference index to exhibits.

Jurisdiction.

The jurisdiction* below as to the claims of the several plaintiffs against United was based upon diversity of citizenship and the requisite jurisdictional amount under 28 U.S.C. § 1332(1). Plaintiffs' claims against the Government were based upon the Federal Tort Claims Act, 28 U.S.C. § 1346(b). The cross-claims of United against the Government were also based upon 28 U.S.C. § 1346(b), see *United States v. Yellow Cab. Co.,* 340 U.S. 543, and as well upon 28 U.S.C. §§ 2671 through 2680; and the cross-claims of the Government against United were based upon 28 U.S.C. § 1345. Each cross-claim filed by each of said defendants against the other was filed pursuant to Rule 13(g), Fed. Rules Civ. Proc.

The jurisdiction here, as to United's several appeals, both as to the judgments recovered against United by the several plaintiff-appellees and as to the judgments allowing contribution in favor of the Government, and conversely, denying indemnity, which is to say *total*

*Due to the bulk of the combined records in these cases, it would unduly lengthen this statement of jurisdiction to here set forth the detailed record references to the pleadings and other portions of the several records necessary to show the existence of the jurisdictions. Accordingly, and for the convenience of the Court, we have set forth such record references in Part II of the Appendix, to which we respectfully invite the Court's attention.

contribution, as against the Government, is invoked under 28 U.S.C. § 1291. The judgments denying United's right to indemnity or to any relief against the Government other than the partial contribution allowed in 22 of the *Wiener* cases, as detailed in Part I of the Appendix, constituted to such extent a final decision and disposition of United's claims in that regard such as would bar, under principles of *res judicata,* any subsequent action brought by United against the Government for the seeking of such relief. Cf. *Providential Dev. Co. v. United States Steel Co.,* 10 Cir., 236 F.2d 277, 280-281. They are therefore appealable judgments or decisions within the meaning of 28 U.S.C. § 1291.

Statement of the Case.

1. Facts.

On April 21, 1958, at 7:37 A.M., United's Flight No. 736, consisting of a propeller-driven Douglas DC-7 airplane, No. N-6328C, departed Los Angeles International Airport en route, on a regularly scheduled flight, to New York with scheduled intermediate stops at Denver, Colorado; Kansas City, Missouri; and Washington, D. C. The DC-7 carried 42 passengers and a crew of 5. Pursuant to an IFR (Instrument Flight Rules) flight plan duly filed with and approved by the CAA (Civil Aeronautics Administration) ARTC (Air Route Traffic Control) at Los Angeles, the DC-7 proceeded along Victor 16 airway to Ontario, California and thence along Victor 8 airway en route to Denver. Each of these two-way airways had been regularly established by the CAA, Victor 8 having been established on June 1, 1952.

At 8:11 A.M., Flight 736 cleared Daggett, California, estimating its arrival time over Las Vegas,

Nevada at 8:31. At approximately 8:30 A.M. Flight 736 radioed as follows:

> "United 736, Mayday, mid-air collision, over Las Vegas."

At that time and place the DC-7 was collided with by a United States Air Force F-100F Super Saber jet fighter airplane, No. 56-3755-A. The latter was at the time engaged in a practice landing or "let-down" maneuver by an instructee pilot under simulated instrument flying conditions. The jet descended upon the DC-7 at angle of descent of 17° at the time of impact, approaching from the left of the latter, crossing in front of its nose and making impact right wing to right wing. As a result, both planes crashed and 47 persons on the DC-7, including all of the plaintiffs' decedents in these 31 actions, and as well the two crew members of the F-100F were killed. The air speed of the DC-7 at the time of the collision was approximately 350 miles per hour; that of the F-100F, 495 miles per hour or more.

It would uselessly encumber this statement to treat here of the detail of the voluminous evidence introduced pro and con as to the issues underlying the liability found by the jury (as to United) and by the court (as to the Government) in favor of the several plaintiffs, or as to the issues underlying the decision of the court that, as between United and the Government, neither was entitled to indemnity, but that each was entitled to contribution, from the other. Such a discussion at this juncture would of necessity only duplicate that which will be both appropriate and necessary to the treatment of those specifications of error, set forth below, which deal with the subjects just mentioned. Accordingly, we have here stated only the central facts surrounding this tragic occurrence; the detail will follow in appropriate sequence.

2. Questions Involved—Manner in Which the Same Are Raised.

(1) Whether the District Court erred, in each of the 22 non-government employee cases, in denying indemnity to United and in awarding contribution in any amount to the Government? This question was raised in each of said cases on Objections and Exceptions of United to Consolidated Findings of Fact and Conclusions of Law (R. 2460) and on Motion of United for New Trial (see Appendix, Part II, record citations, non-government employee cases); and see, also, Opening and Closing Briefs of United re indemnity (R. 2205, 2303).

(2) Whether the District Court erred, in each of the 22 non-government employee cases, in failing to find and to conclude that the Government was guilty of reckless or wilful misconduct? This question was also raised in each of said cases on United's Objections and Exceptions to Consolidated Findings of Fact and Conclusions of Law and on its Motion for New Trial.

(3) Whether the findings of the District Court in each of the 22 non-government employee cases, as to active, causative negligence on the part of United are clearly erroneous and without substantial support from the evidence? Also raised in each of said cases as specified in the last preceding question, numbered (2) above.

(4) Whether the District Court erred, in each of the 22 non-government employee cases, in finding and concluding that the crew of the DC-7 negligently failed to see and to take evasive action to avoid the Air Force jet? Also raised in each of said cases as specified in said question numbered (2).

(5) Whether the District Court erred, in each of the 22 non-government employee cases, in failing to

find and to conclude that the crew of the DC-7 could not see the F-100F as it descended upon them? This question is an amplification of question numbered (4) above and is raised in each of said cases as specified with reference to said question (4). It is also raised upon the face of the record, agreeably to the provisions of Rule 52(a) of the Federal Rules of Civil Procedure.

(6) Whether the District Court erred, in each of the 9 government employee cases, in denying to United the right to seek indemnity from the Government and in dismissing United's cross-claims seeking such relief? Raised in each of said cases by United's Motion for New Trial, Memoranda in opposition to Government's motions and motions to reconsider (Appendix, Part II, record citations, government employee cases).

(7) Whether the District Court erred in rendering and entering the judgment in each case in favor of the passenger-plaintiffs and against United? Raised in each case by United's Motion for New Trial (Appendix, Part II, citations, all cases).

(8) Whether the verdict finding liability against United in each of the *Wiener* cases was against law? Raised on United's Motion for New Trial (Appendix, Part II, record citations, *Wiener* cases).

(9) Whether the following implied findings of the jury in the *Wiener* cases were clearly erroneous and without substantial support from the evidence? namely:

(a) that the crew of the DC-7 was negligent in failing to see and to take evasive action to avoid the Air Force jet and that such negligence was a proximate cause of the collision and resulting deaths;

(b) That the pre-collision omission of failure to institute an appropriate program of scanning instruction was negligent and a proximate cause of the collision and resulting deaths;

(c) that the pre-collision omission of United to familiarize itself and acquaint its crews with the details of the flying conditions and hazards in the Las Vegas-Nellis area, including the details of the KRAM procedure,* was negligent and a proximate cause of the collision and resulting deaths.

The foregoing questions were each raised by United's Motion for New Trial in each of said cases. (Appendix Part II, record citations, *Wiener* cases).

(10) Whether the implied finding of the jury in the *Wiener* cases that the collision and resultant deaths were proximately caused by some unspecified negligent act or omission on the part of United was clearly erroneous as being predicated upon the drawing of an inference under the doctrine of *res ipsa loquitur* which as a matter of applicable law the jury was not entitled to draw? Raised by United's objections and exceptions to the charge to the jury (55 Rep. Tr. 7323-7325; 48 Rep. Tr. 6381, 6427, 6439) and by United's Motion for New Trial in each of said cases (Appendix, Part II, record citations, *Wiener* cases).

(11) Whether the District Court erred in its instructions to the jury in the *Wiener* cases with reference to the doctrine of *res ipsa loquitur?:*

(a) in giving any instruction with reference to the doctrine at all (raised as specified with reference to the immediately preceding question numbered (10);

(b) in refusing to instruct that, if the doctrine had application under applicable law it could only

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*A simulated instrument penetration or "let-down" maneuver for Air Force jet airplanes which took its name from radio station KRAM in Las Vegas, which station was used as a "fix" for carrying on the maneuver. The jet involved in the collision of April 21, 1958, was engaged in a KRAM descent at the time. (See FF. 17, 18: R. 2533-2535).

apply in the event the jury found that United was in exclusive control of the instrumentality causing the accident (raised by objection and exception duly filed (R. 2344B).

(12) Whether or not the District Court erred, in the 7 Nevada cases, in granting motions for summary judgment as to the issue of liability? Raised on Motion for New Trial in each of the said cases (Appendix, Part II, record citations, Nevada cases).

(13) Whether or not the District Court erred, in two of the Nevada cases (Nollenberger and Matlock) in increasing, by improper additur thereto, the amounts of the general verdicts returned by the jury. Raised on Motion for new trial in each of the said cases (Appendix, Part V).

14) Whether or not the District Court erred, in each of the 31 cases, in denying United's Motion for New Trial? Raised in each of said cases by said Motion (Appendix, Part II, record citations, all cases).

Upon the basis of the foregoing questions, United raises and respectfully presents for the Court's consideration the propositions of law herein elsewhere discussed, all as specified in the subject index hereto.

Specification of Errors.

(1) The District Court erred, in each of the 22 non-government employee cases, in denying indemnity to United and in awarding contribution in any amount to the Government.

(2) The District Court erred, in each of the 22 non-government employee cases, in failing to find and to conclude that the Government was guilty of reckless or wilful misconduct.

(3) The findings of the District Court in each of the 22 non-government employee cases as to active, cau-

sative negligence on the part of United are clearly erroneous and without substantial support from the evidence.

(4) The District Court erred in each of the 22 non-government employee cases in finding and concluding that the crew of the DC-7 negligently failed to see and to take evasive action to avoid the Air Force jet.

(5) The District Court erred in each of the 22 non-government employee cases in failing to find and to conclude that the crew of the DC-7 could not see the F-100F as it descended upon them.

(6) The District Court erred, in each of the 9 government employee cases, in denying to United the right to seek indemnity from the Government and in dismissing United's cross-claims seeking such relief.

(7) The District Court erred in rendering and entering the judgment in each case in favor of the passenger-plaintiffs and against United.

(8) The verdict finding liability against United in the *Wiener* cases was against law.

(9) The following implied findings of the jury in each of the *Wiener* cases were clearly erroneous and without substantial support from the evidence, namely:

(a) That the crew of the DC-7 was negligent in failing to see and to take evasive action to avoid the Air Force jet and that such negligence was a proximate cause of the collision and resulting deaths;

(b) that the pre-collision omission of failure to institute an appropriate program of scanning instruction was negligent and a proximate cause of the collision and resulting deaths;

(c) that the pre-collision omission of United to familarize itself and acquaint its crews with the details of the flying conditions and hazards in

the Las Vegas-Nellis area, including the details of the KRAM procedure, was negligent and a proximate cause of the collision and resulting deaths.

(10) The implied finding of the jury in the *Wiener* cases that the collision and resultant deaths were proximately caused by some unspecified act or omission on the part of United was clearly erroneous as being predicated upon the drawing of an inference under the doctrine of *res ipsa loquitur* which as a matter of applicable law the jury was not entitled to draw.

(11) The District Court erred in its instructions with reference to the doctrine of *res ipsa loquitur:*

(a) in giving any instruction with reference to the doctrine at all;

(b) in refusing to instruct that, if the doctrine had application under applicable law it could only apply in the event the jury found that United was in exclusive control of the instrumentality causing the accident.

(12) The District Court erred, in the 7 Nevada cases, in granting motions for summary judgment as to the issue of liability.

(13) The District Court erred, in two of the Nevada cases, in increasing, by improper additur thereto, the amounts of the general verdicts returned by the jury.

(14) The District Court erred, in each of the 31 cases, in denying United's Motion for New Trial.

Summary of the Argument.

As a subject for preliminary consideration, there is first discussed the matter of orderly presentation of the points urged by United for reversal. This discussion culminates in the conclusion that the subject of United's right to indemnity as against the Gov-

ernment should first be covered, thus enabling the Court to reach the heart of the case—the question of basic fault and responsibility as between these two defendants—at the outset.

The evidence is then discussed in some detail, and it is pointed out that, as a matter of law arising from the undisputed facts, the Government was guilty of far more than the active, causative negligence which the District Court found to exist; it was in fact guilty of reckless or wilful misconduct in that the collision occurred as the direct result of the wilful or reckless operation of the Air Force jet in the course of a dangerous, high speed and practically blindfolded training maneuver devoid of safety precautions and conducted in the path of a heavily travelled commercial airway.

Authorities are next cited as to the right to the allowance of indemnity to one, as here United, exposed to liability to third persons by the actively negligent or wilfully reckless act of another, as here the Government. And in this connection it is pointed out that passive negligence on the part of the party seeking indemnity will not bar his right to indemnity from an actively negligent joint or concurrent tortfeasor; and that, further, in the event that such tortfeasor is guilty of reckless and wilful misconduct, even ordinary or contributory negligence on the part of such party will not bar his right.

The lack of merit of the Government's defenses to United's claims for indemnity is next discussed. It is pointed out preliminarily that as between the Government and United, neither is entitled to the benefits of the doctrine of *res ipsa loquitur* as against the other: hence any claim of active negligence on the part of United must be predicated upon evidence of a higher dignity than that pertaining to the inference, or, according to some jurisdictions, the presumption, of cau-

sative negligence arising from the application of the doctrine.

The evidence as to the doings of United at and prior to the time of the collision is next examined. It is pointed out that the evidence, without substantial conflict, reveals that the United crew, due to structural limitations of the windscreen of the DC-7, could not see the Air Force jet as it descended upon them; hence the court's findings that United *negligently* failed to see and take appropriate action to evade the jet are without substantial support. As for the pre-collision omissions found by the court, such as the failure of United to acquire knowledge of, and acquaint its crews with, the details of the doings of the Air Force in the Las Vegas area and its failure to institute an appropriate program of scanning, it is pointed out that these matters were at most purely passive and irrelevant from the standpoint of proximate cause. Thus, a scanning program would have been of no avail to a crew which in any event could not see what was descending upon them from above; and so far as the doings of the Air Force were concerned it was the Government's duty to enlighten the air lines, not the duty of the latter, to search out the details of KRAM, an unpublished, hazardous and unsafe Air Force maneuver known to the CAA and of course to the Air Force, but not to the airline industry.

What has been said above has reference to the 22 non-government employee cases, in which the question of United's right to indemnity was tried on the merits. In the 9 government employee cases, United was denied the right to seek indemnity, its cross-claims to this end having been dismissed by the District Court. It is pointed out in this connection that any previous question as to the right of a party to seek relief over against the Government for liability imposed in favor of a gov-

ernment employee in a general tort action has been settled in favor of allowing such relief over by the combined effect of the decisions of the Supreme Court in *Weyerhaeuser S.S. Co. v. United States,* 372 U. S. 597 and in *Treadwell Constr. Co. v. United States,* 372 U. S. 772.

The points urged for reversal of the judgments in favor of the passenger-plaintiffs are next taken up. The verdict finding liability against United is attacked as being against law. It is pointed out that the implied findings of the jury as to operative negligence (failure to see and to avoid) and as to pre-collision negligence are without substantial support for substantially the same reasons as those underlying the attack upon the court's findings in such regards as between United and the Government. In this connection, insofar as United's lack of knowledge as to the unpublished KRAM procedure is concerned, it is pointed out that a common carrier is under no duty to foresee and to provide against casualties which are of a character not reasonably to be anticipated or which have not before been known to happen; and in this regard it is further pointed out that the fact that *both* the Air Force and the CAA were fully aware of this hazardous and unsafe procedure and *neither* of them disclosed its existence to the air lines simply makes the matter worse.

It is next pointed out that the District Court erred in its instructions given and refused on the doctrine of *res ipsa loquitur*; that in effect it instructed under the law of California, rather than under the *lex loci,* that of Nevada; that the materiality of this discrepancy lies in the fact that California has abandoned the element of exclusive control as being an essential element of the doctrine, whereas Nevada has not; and that this element is of paramount importance in a collision case. where two instrumentalities are necessarily involved.

It is also pointed out that implicit in the general verdict against United is an implied finding, directly traceable to the erroneous *res ipsa* instruction, that a proximate cause of the collision was some unspecified, inferential, act of negligence on the part of United; hence this implied finding is attacked as being predicated upon an inference which the jury was not entitled to draw under applicable law, that of Nevada.

The foregoing points of course take the argument into the field of conflicts of law. Following *Erie R.R. Co. v. Tompkins,* 304 U. S. 64, it is shown that the conflicts of law principles of California are substantive in their nature; that California, which has not spoken upon the subject under discussion, would be reasonably expected in the conflicts field to follow clear-cut federal decisions which hold, in the field of conflict of laws that the *lex loci*, here that of Nevada, as a matter of its own substantive law, governs as to whether and to what extent and with what results the doctrine of *res ipsa* has application to a given fact situation. It is then pointed out that since Nevada has not abandoned the element of exclusive control as being an essential ingredient of the doctrine, it was error to refuse to instruct, as requested by United, as to this requisite element; and further, since in fact the element of exclusive control was undeniably absent, it was also reversible error to instruct on the doctrine at all.

It is next pointed out that it was prejudicial error, in the 7 Nevada cases, to grant motions for summary judgment against United as to the issue of liability on the theory that the verdicts and judgments in the *Wiener* cases constituted *res judicata* by way of collateral estoppel as to that issue. The reason given for this is that the *finality* of a judgment, its *competency* to prove a given fact and the *sufficiency of evidence* to establish a given fact all affect substantial rights

within the scope of the holding in *Erie R.R. v. Tompkins.* It is then pointed out that since the *Wiener* judgments were all judgments rendered in California under the diversity jurisdiction, it was the duty of the District Court to follow substantive California law as to these matters. It is next pointed out that under California law a judgment is neither final nor competent evidence for purposes of *res judicata* or collateral estoppel until the time for appeal has lapsed or so long as an appeal is pending therefrom, which is the fact here as regards the *Wiener* cases.

Next, it is pointed out that it was prejudicial error for the District Court, in two of the Nevada cases (Nollenberger and Matlock), to increase the general verdict of the jury, ostensibly pursuant to Rule 49(b), Fed. Rules Civ. Proc. In so doing the court invaded the province of the jury and, by way of additur, deprived United of its right to a trial by jury as to the issue of damages, all in contravention of the 7th Amendment to the Constitution.

Lastly, it is pointed out that the District Court erred in denying United's Motion for New Trial in each of the 31 cases for the reasons set forth herein as being applicable either to such case or to the group of cases to which such case belongs.

ARGUMENT.

PRELIMINARY CONSIDERATIONS.

The main issues below concerned the liability, joint and several, of United and the Government to the several plaintiffs, as well as the liability over of the two defendants, each to the other, in the event the plaintiffs should recover judgment, as they did. The question as to which of these two phases of the litigation should be discussed first herein, from the standpoint of an orderly presentation of United's case, warrants preliminary consideration.

United's case against the Government for liability over by way of indemnity, assuming for present purposes liability on United's part to the plaintiffs, is clear-cut and may be simply stated. It is that the entire or at the very least the primary fault and responsibility for the collision and resulting deaths rested with the Government for two basic reasons. The first reason consisted of the demonstrable lack of any effective degree of coordination between two agencies of the Government, the CAA and the Air Force. The result was, as will be shown, that—although the CAA had regulatory powers over both civilian and military traffic and the means to provide an effective separation between the heavy commercial traffic on this CAA established Victor 8 airway and the heavy military flight operations within and over the same area were readily at hand—no attempts at such a traffic separation were made by either agency. The second reason consisted of the fact that, as will also be shown, the collision occurred as the direct result of either wilfully reckless or actively negligent operation of the Government jet in the course of what amounted to a practically blindfolded training maneuver devoid of effective safety precautions; and that in these circumstances the United

airliner and its passengers were alike victims of the intransigence of the Air Force in persisting in dangerous and unsafe training maneuvers within this heavily traveled, CAA-sponsored, commercial airway.

Obviously, in the brief as a whole, the acts and omissions of the two co-defendants at and prior to the time of the collision must be examined in detail. They must be examined, however, in the light of the different standards of care applicable as between United and the passengers, on the one hand, and as between United and the Government on the other. United owed to the passengers the utmost or the highest degree of care. To the Government, its duty was to observe the conventional standard of ordinary and reasonable care in the light of attendant circumstances, subject always to the important qualification that if, as we propose to show, the Government was guilty of reckless and wilful misconduct, even a breach of this duty of ordinary care by United would not defeat its right to indemnity. On the other hand, in the case of the passengers, there is the question of whether, in the present setting—a collision case involving two instrumentalities —the plaintiffs were entitled to the advantage which the doctrine of *res ipsa loquitur* affords. This, in turn, depends upon the solution of a question of choice of law affecting the propriety of certain instructions to the jury, all as will be pointed out in the development of the appeals from the judgments in favor of those whom we may term the passenger-plaintiffs.

None of these complicated problems which must arise in the passenger-carrier phase of the case, however, attends the right of United, notwithstanding the passenger judgments, to obtain the indemnity against the Government which it sought below and which it seeks here. As between these two defendants the basic ques-

tion is whether, despite the District Court's finding to the contrary, the Government was guilty of reckless and wilful misconduct, in which case the question of whether or not United was guilty of ordinary negligence would, as we will show, be irrelevant as regards United's right to indemnity. Next, it is United's case that in any event and at least so far as the Government is concerned, it was not negligent at all, or, if it was, any negligence on its part was passive and secondary to the actual causative negligence found by the Court as regards the Government. Thus it is United's case that if, because of the duty of utmost care specially imposed upon a carrier vis-a-vis its passengers, it may not successfully resist the plaintiffs' claims, it has been placed in this position, not by reason of any breach of duty which it owed the Government, but solely because of the high degree of care which it owed the passengers.

It is true that the court below did find active, as distinguished from passive, negligence on the part of both the Government and United; and it is our burden herein—a burden which we willingly accept—to demonstrate that such finding as to United is clearly erroneous and without support in the evidence.

In our view, what has been said indicates that in the interests of an orderly presentation of the case we should first proceed with the indemnity phase of the case: the case of United vis-a-vis the Government, viewed from the standpoint of the reciprocal duties owed by each to the other. In this way we will reach, at the outset, the heart of these lawsuits: the question of which of these defendants was primarily and basically at fault and responsible for the collision and resulting deaths. In saying this, we are not to be understood as referring to any such technical concepts as proximate causation or comparative negligence. Rather, having in mind the language quoted

by this Court in *Snohomish County v. Great Northern Ry.*,* 9 Cir., 130 F. 2d 996, 1000, we are asking the Court "to inquire into the relative delinquency of the parties, and to administer justice between them. . . ." In this regard it will be assumed, for present purposes only, that the judgments below against United and in favor of the respective plaintiffs were right in their result, at least to the extent of indicating a breach of the carrier's duty of utmost care toward its passengers.

I.

THE DISTRICT COURT ERRED, IN THE 22 NON-GOVERNMENT EMPLOYEE CASES, IN DENYING INDEMNITY TO UNITED AND IN AWARDING CONTRIBUTION IN ANY AMOUNT TO THE GOVERNMENT.

These two points go hand in hand. As in all of the cases, United sought indemnity, which is to say *total* contribution, from the Government. Instead of granting such relief, the District Court, in the 22 non-government employee cases, and after trial on the merits,** awarded partial contribution as between the two defendants. The general pattern of such awards was to allow the Government contribution from United in an amount equal to one-half the amount of the recovery awarded by the court to the plaintiffs from the Government, but not to exceed the total amount of recovery awarded by verdict to the plaintiffs from United, which amounts in general were less than the

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*Discussed later herein as regards its holding as to the propriety of the award of indemnity to the railroad from the county, the negligence of the county, resulting in a train wreck, having been found to be active, and that of the railroad, passive.

**In the 9 government employee cases, United's cross-claims for indemnity against the Government were *dismissed* by the District Court; a matter which is discussed under Point II hereof.

awards against the Government. (See Appendix, Pt. 1.) In thus denying indemnity to United (R. 2550: Concl. of Law XVI) and in so awarding contribution to the Government in any amount, the District Court erred.

A. United's Case for Indemnity Against the Government.

1. The District Court Properly Found the Government Guilty of at Least Active Negligence Proximately Causing the Collision and Resultant Deaths.

United charged the Government with wilful, which is to say reckless misconduct, and each of the defendants charged the other with active, as opposed to passive, negligence. (See Pre-Trial Order in this regard, R. 1777, 1779, 1780.) These issues were tried to the court, which found both defendants guilty of active causative negligence and found neither of them guilty of wilful, wanton or intentional negligence.*

United, as appellant on these appeals, accepts in toto the findings as to the sundry acts and omissions on the part of the Government as being a correct embodiment of the evidence. Should the Government on its own appeal attack these findings, or any thereof, for asserted lack of support, United will deal with any such contentions in its reply brief herein. At present United takes such findings, as it is entitled to do in the absence of any attack upon them, at face value. However, and in order to round out the picture, reference will also be made at this time to the evidence bearing upon the various points material to the present subject of discussion.

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*FF. 26-28, 30, 37, 41, 49-52, 55, 56, 61, 66-69, 86; R. 2536-38, 2540-45, 2548. The findings as to negligence on the part of the Government are summarized infra commencing at page 31 hereof.

As indicated earlier, United's case against the Government rests upon two bases: a demonstrable lack of coordination between two government agencies, the CAA* and the Air Force, plus persistent and wilful recklessness or in any event actual and causative negligence in the Nellis Air Force Base—Las Vegas area.

a. Material Factors as Regards the Government's Culpability.

The following factors are material to the demonstration of the Government's culpability in the respects just mentioned:

(1) *Public policy underlying the Civil Aeronautics Act of 1938*—includes "The regulation of air transportation in such manner as to . . . assure the highest degree of safety in [air] transportation . . .; The regulation of air commerce in such manner as to best promote its . . . safety; . ." 49 U.S.C. § 402(b), (e).

(2) *Power of the Administrator of Civil Aeronautics to establish civil airways and appurtenant aids for air navigation under 1938 Act.* 49 U.S.C. § 452.

(3) *Civil airways, such as Victor 8, were in fact established by CAA pursuant to above statutory authority and their use by civil airlines was strongly advocated by the CAA Administrator in the interests of flying safety.* (F. 6: R. 2530; 30 Rep.Tr. 4033; 8 Rep.Tr. 960, 962; see, also, 6 Rep.Tr. 763; CAA Flight Info. Manual, Ex. G-2, p. 51.)

(4) *Power on the CAA to establish appropriate rules and regulations.* 49 U.S.C. § 425(a).

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*The collision took place on April 21, 1958, prior to the enactment on August 23, 1958, of the Federal Aviation Act of 1958. 72 Stat. 737, as amended: 49 U.S.C. § 1301, et seq. Governing federal law at the time was therefore the Civil Aeronautics Act of 1938. 52 Stat. 977 as amended: 49 U. S. C. §401 et seq. Under the 1958 Act the Civil Aeronautics Administration has been succeeded by the Federal Aviation Agency.

(5) *Requirement that military instrument approaches be coordinated with the CAA.* (Ex. G-4, p. 4, § 1.0402; 6 Rep.Tr. 776.)

(6) *Rules and regulations of the CAA as having force of law and as being binding on military aircraft where, as here, there are no military regulations to the contrary. United States v. Causby,* 328 U.S. 256, 258 n.2; *San Diego Gas & Elec. Co. v. United States,* 9 Cir., 173 F.2d 92, 93. See, also, stipulation by the Government that Air Force pilots were bound by Civil Air Regulations (CAR). (20 Rep.Tr. 2722.)

(7) *Violation of CAR as being negligence per se.* (Ibid.)

(8) *Correlative rights and duties of the two planes under Civil Air Regulations of the CAA, bearing in mind that the DC-7 had the right of way.*

The jet owed the DC-7 the following duties:

(a) To give way to the latter, the DC-7 being on its right.

(b) To avoid passing over or under or crossing in front of the DC-7, unless passing well clear.

(c) Not to be operated in such proximity to the DC-7 as to create a collision hazard or in such a careless or reckless manner as to endanger the life or property of others. (CAR 60.12, 60.14, 60.14n, 60.14(b), 60.15: 55 Rep.Tr. 7331-7332;*

see Nevada Rev. Stats. § 493.130, Appendix, Part III, and cf. AFR 6016, Section B, Par. 10, 55 Rep.Tr. 7351.)

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*" '60.12. *Careless and reckless operation.* No persons shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.

* * *

" '60.14. *Right-of-way.* An aircraft which is obliged by the following rules to keep out of the way of another shall avoid

As against the foregoing, the DC-7, having the right-of-way, had the right normally to maintain its course and speed, subject to the responsibility of the pilot "for taking such action as will best aid to avert collision." (CAR 60.14n: 55 Rep.Tr. 7332.)

(9) *Victor 8 airway*—was established by the CAA on June 1, 1952. At the time of the collision it was a major transcontinental airway used extensively by air traffic, including large passenger airlines such as the subject DC-7 and was the principal route between Los Angeles and Denver. It was common knowledge that it was a regular route for two-way traffic. It included the navigable airspace up to 27,000 feet above sea level and was 10 miles in width. (FF. 5, 6, 7: R. 2530-2531.)

(10) *Clearance of Flight 736 by the CAA*—as per flight plan showing utilization of Victor 8 to, over and through Las Vegas and Nellis Air Force Base. (F. 12: R. 2531-2532.)

(10) *Flight of the F-100F—the KRAM procedure for simulated "teardrop" let-downs—the collision—*

> "On April 21, 1958, the Government's F-100F had two pilots aboard. Pilot Lt. Moran was learning to operate this airplane by instruments only

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passing over or under the other, or crossing ahead of it, unless passing well clear.

" "Note: * * * The aircraft which has the right-of-way will normally maintain its course and speed, but nothing in this part relieves the pilot from the responsibility for taking such action as will best aid to avert collision.

" '(b) Converging. * * * When two or more aircraft of the same category are converging at approximately the same altitude, each aircraft shall give way to the other, which is on its right. * * *

* * *

"60.15. *Proximity of aircraft.* No person shall operate an aircraft in such proximity to another aircraft as to create a collision hazard.' " (55 Rep. Tr. 7331-7332.)

in the rear seat and at all pertinent times during the flight was under a hood and was unable to see outside of the cockpit in which he was seated. It was his first such instrument penetration or let down procedure in an F-100 type aircraft. Lt. Moran had previously flown and practiced teardrop let down procedures in T-33 jet aircraft. An experienced instructor pilot, Capt. Coryell, who had never been on an instrument mission with Lt. Moran before, occupied the front seat and had two-way microphone communication available at all times with Lt. Moran. It was the instructor's duty to instruct the pilot in the rear seat, to monitor each step of his performance, to monitor the engine, navigation and other instruments of the plane, and to maintain a visual lookout for other aircraft. It was also the instructor pilot's duty to take careful note of the extent of each of the student's deviations from the prescribed procedure, if any, so that he could take over the controls when such deviations reached dangerous proportions, and so that he could later brief the student. The F-100F had dual pilot controls and the instructor could take over the operation and control of the airplane at any time." (F. 16: R. 2533.)

"This training flight took off at approximately 07:45 P.S.T. Lt. Moran was to receive training in primary instrument maneuvers during the first portion of the training period which was to be conducted in the transition area, an area lying off Victor 8 and designated for and used to teach basic instrument flying. Subsequently, just prior to finishing the mission and on his way back to Nellis Air Force Base, Lt. Moran was to engage in a practice teardrop instrument penetration, with-

out obtaining from CAA an IFR traffic clearance or traffic information therefor, involving a descent and approach to Nellis under simulated instrument flying conditions. This penetration was supposed to be executed in conformity with a procedure, known as the KRAM procedure, formulated and prescribed by agents of the Government. . . . The term 'teardrop' derives its name from the fact that the path of the plane executing said KRAM procedure, if drawn on the earth, would resemble the shape of a teardrop." (F. 17: R. 2533-2534.)

"On April 21, 1958, while engaging in an Air Force training flight, which, among other things included the said KRAM practice instrument penetration involving a descent and approach to Nellis Air Force Base under simulated instrument flying conditions, at about 08:30 P.S.T. near Las Vegas, Nevada, the Government jet airplane was involved in a collision with United's DC-7 airplane, which was then proceeding in the vicinity of Las Vegas, Nevada, along Victor 8 airway en route from Los Angeles, California to Denver, Colorado, under the IFR air traffic clearance issued to it by the CAA. The collision caused the crash and total destruction of both airplanes and the property thereon and the death of all persons of both airplanes (forty-seven persons on the DC-7 and two persons in the F-100F jet), including all of the decedents named in the complaints in the consolidated actions." (F. 18: R. 2534-2535.)

(12) *The F-100F flew off course and failed to follow the path prescribed by the KRAM procedure.* (F. 33: R. 2537.)

(13) *Failure of the Government to effect traffic separation as between visual and instrument-controlled flights*—the radio control facility at Nellis Air Force

Base (Nellis VFR Control) was neither designed to, nor did it, provide traffic separation as between Nellis jet planes, operating under visual flight rules (VFR) in and about Victor 8 airway, and other users of the air space, such as the DC-7 commercial airliner, flying under instrument flight rules (IFR) clearance. (F. 22: R. 2535.) The significance of an IFR clearance lies in its adaptability to the effectuation of traffic separation with other aircraft possessing IFR traffic information. (CF. FF. 23-30: R. 2535-2537.)

(14) *Failure of Government to utilize available facilities for traffic separation as between military and commercial aircraft*—there was available at all times to Nellis personnel information as to IFR traffic utilizing Victor 8, whereby traffic separation between the Nellis jets and commercial users could and would have been effected. No attempt was made, however, to obtain such information, which should have been obtained in the exercise of ordinary care. Had such information been sought, it would promptly have been supplied through CAA channels and such traffic separation would have been effected, thus permitting the DC-7 to clear the area without incident. (FF. 23-30: R. 2535-2537.)

(15) *Violation by the F-100F of the DC-7's right of way*—the true air speed of the F-100F at and immediately prior to impact was 495 miles per hour or more; that of the DC-7, approximately 350 miles per hour. The closure speed was approximately 735 miles per hour. The F-100F was more maneuverable than the DC-7. The former descended upon the DC-7 at an angle of descent of 17°, having dropped 7,000 feet in about two minutes, crossed in front of the nose of the DC-7 and made contact with the latter, right wing to right wing. The relative bearing of the F-100F with respect to the DC-7 in a horizontal plane, meas-

ured counterclockwise from the nose of the DC-7, was approximately 33°. The F-100F approached from above and from the left of the DC-7 and had the DC-7 on its right, but it negligently failed to yield the right-of-way to the DC-7. (FF. 32, 35, 36, 38-41, 43: R. 2537-38; 27 Rep. Tr. 3729; 42 Rep. Tr. 5551.)

(16) *Failure of the F-100F to extend its speed brakes*—the same were retracted, when pursuant to regulations and in the exercise of ordinary care, they should have been extended. (FF. 17, 37: R. 2533, 2538; 44 Rep. Tr. 5875.)

(17) *Shortcomings of the KRAM procedure from the standpoint of safety to both civilian and military aircraft*—failure of Nellis Command to set up the KRAM procedure so as to avoid Victor 8 at altitudes used by commercial passenger planes. (FF. 49-51: R. 2540-2541.) Failure of Nellis Command to give jet pilots adequate information, warnings and instructions with reference to avoidance of commercial passenger planes. (F. 52: R. 2541.) Failure of Nellis Command to require pilots practicing the KRAM procedure to obtain either traffic information or IFR clearances, both of which were available. (F. 55: R. 2541.) Failure of the Nellis command to take appropriate steps to publicize its use of the KRAM procedure after its inception on May 10, 1957. (F. 56: R. 2542; 8 Rep. Tr. 951.) Failure of the Air Force to coordinate the KRAM procedure with its program of Flight Safety. (9 Rep. Tr. 1191.) The KRAM procedure was not carefully designed from the standpoint of civil en route traffic. (9 Rep. Tr. 1206-1207.) The KRAM procedure was unpublished but was known to the CAA, which failed to notify the airlines. (8 Rep. Tr. 970, 973, 977-978.) Teardrop penetration could have been simulated and performed under IFR, with traffic clearance and resultant safety to en route commercial traffic. (8 Rep. Tr. 1045.) Air Force practice was to

refrain from obtaining IFR clearances because of the delay factor. (15 Rep. Tr. 1883.) There was no safety factor included in the KRAM procedure to prevent collision between Nellis planes and commercial airliners flying down Victor 8. (15 Rep. Tr. 2010.) 85% of the KRAM practice was within Victor 8, through which there were 84 commercial flights per week. (19 Rep. Tr. 2542, 2564.) There were as many as 45 to 60 Nellis F-100Fs in the air at any one time and between 500 and 600 jet "movements" (take-offs, landings and missed approaches) per day. (20 Rep. Tr. 2626, 2628.) VRF flying affords no method of separation from IFR traffic. (21 Rep. Tr. 2837.) For high altitude, high speed aircraft,* visual detection is not adequate to provide safe separation. (21 Rep. Tr. 2855.) The Air Force had been advised, by its own Behavioral Sciences Laboratory since at least 1955 and through written articles that a pilot's vision under VFR is not an adequate safeguard against mid-air collisions, especially at high rates of speed. (28 Rep. Tr. 3795-3796.) The intermixture of IFR and VFR was lethal. (35 Rep. Tr. 4751; 36 Rep. Tr. 4808, 4841.) The Air Force position was that the "see and be seen" concept had to be lived with for a while. (31 Rep. Tr. 4128-4129.)

b. Recapitulation: The Specific Findings of Negligence Against the Government.

These were:

Failure to secure an IFR clearance or traffic information by or for the jet pilots or to establish a procedure in this regard. (FF. 26, 30, 55, 66, 69: R. 2526, 2537, 2541, 2544, 2545.)

Failure to utilize available radio facilities for the requesting of an IFR clearance. (F. 27: R. 2536.)

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*I.e., any aircraft flying at a speed of in excess of 300 miles per hour. (21 Rep. Tr. 2863.)

Failure to make inquiry as to airline traffic on Victor 8. (F. 28: R. 2536.)

Failure to extend speed brakes of the F-100F. (F. 37: R. 2538.)

Failure to yield right of way. (F. 41: R. 2538.)

Failure to design the KRAM procedure so as to avoid Victor 8 at altitudes regularly used by en route commercial passenger planes. (FF. 49, 61: R. 2540. 2543-2544.)

Failure to make study of commercial traffic in the area and to design and utilize the KRAM procedure in the light of such study. (F. 50: R. 2541.)

Failure to coordinate the KRAM procedure with United or other commercial carriers utilizing Victor 8. (F. 51: R. 2541.)

Failure to inform and warn F-100F pilots of hazards of collision and to instruct them to exercise extreme caution on Victor 8. (F. 52: R. 2541.)

Failure to give notice by any appropriate means to United or to other airline carriers of the KRAM simulated instrument penetration procedure being practiced under *visual* flight rules in the Las Vegas-Nellis area (F. 56, 68: R. 2542, 3545), though giving Flight 736 a clearance under *instrument* flight rules through the area. (F. 57: R. 2542.)

The manner in which the F-100F pilots operated and controlled their plane while in the air on April 21, 1958. (F. 65: R. 2544.)

The establishment and use of the KRAM procedure under VFR conditions. (F. 67: R. 2544, 2545.)

Failure of the crew of the F-100F to see and avoid the DC-7. (F. 73: R. 2547.)

In these circumstances, United respectfully urges that the foregoing findings, plus the evidence hereinabove

referred to, indicate, without substantial contradiction, that the Government was guilty of far more than the active negligence found by the court with reference to the Government's conduct. Upon the record, the Government stands convicted of reckless or wilful misconduct; a subject to which we now turn.

2. The Facts Found by the District Court and the Evidence in the Record Indicate, Without Substantial Conflict, That the Government Was Guilty of Reckless or Wilful Misconduct; and the Court Erred in Failing so to Find and Conclude.

When we speak of the Government, both here and elsewhere, we refer to each and both the CAA and the Air Force, since each of these governmental agencies played its part in bringing about the ultimate tragedy. While the charge of wilful or reckless misconduct is to be laid principally at the Air Force's door, the point which the CAA played in setting the stage for the occurrence of April 21 should by no means be overlooked.

It was the CAA which strongly advocated, in the interests of safety, the use by civil air lines of the airways which it had established. (8 Rep. Tr. 960, 962.) It was the CAA which knew of the KRAM procedure, failed to disclose it to the air lines, and failed to provide for any traffic separation between the IFR commercial traffic and the Air Force VFR simulated instrument let-downs. (8 Rep. Tr. 970-978; FF. 68-70: R. 2545.) Lastly, it was the CAA which cleared Flight 736 over and through Victor 8 airway on its ill-fated journey. (F. 12: R. 2531-2532.)

It was thus the CAA which placed Flight 736 within the ambit of the Nellis Air Force Base operations. We next turn to the doings of the Air Force and particularly the deadly propensities of the KRAM proce-

dure, which, be it recalled, was a secret maneuver so far as the air lines were concerned.

The indifferent attitude of the Air Force toward civilian safety is, we think, first worthy of remark. The "see and be seen" concept, a built-in feature of the KRAM procedure "had to be lived with for a while" (31 Rep. Tr. 4128-4129); the airways were "impinged" upon the air bases; pilots had to be trained and the only way to get them down was to utilize a penetration procedure; "we couldn't move the air base after the airways were put in over the air base"; *this was not a safe situation; it was the product of necessity.** (9 Rep. Tr. 1197-1199.) Indeed, the military point of view seemed to reflect what we may appropriately term a "Russian roulette" approach. Thus the testimony of Lt. General Quesada, now retired:

> ". . . it would be very difficult to create a collision even if you tried. . . . I am sure it would have taken many, many hundreds of attempts to have made these airplanes collide if you had tried to." (31 Rep. Tr. 4228.)

The Air Force had known since 1955, per publications of its own Behavioral Sciences Laboratory, that a pilot's vision under VFR is not an adequate safeguard against mid-air collisions, especially at high speeds. (28 Rep. Tr. 3795-3796.) This fact was also proven independently. (21 Rep. Tr. 2855, 2863.) KRAM, however, increased even this basic inadequacy. The student pilot was in effect blindfolded; he operated under a hood so that he had no opportunity for visual oberservation. (F. 16: R. 2533.) And the instructor pilot's opportunity in this regard was hopelessly limited by imposing upon him the additional duties of instruct-

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*As exemplified by similar operations at Goodfellow Air Force Base, Wichita Falls, Texas.

ing the student pilot in the rear seat, monitoring each step of the latter's performance and monitoring the engine, navigation and other instruments of the plane; all of this being done while travelling at least 495 miles per hour and in the course of a maneuver which was designed to get from a high to a low altitude "quick," and which involved travelling 19 miles and dropping some 7,000 feet to the collision point in 2½ minutes. (FF. 16, 32, 35: R. 2533, 2537, 2538; 10 Rep. Tr. 1331.)

Now, it cannot be overstressed that the Air Force intentionally chose this ultra-hazardous, virtually sightless, high speed, VFR maneuver and deliberately excluded therefrom the obtaining of either an IFR clearance or IFR traffic information, the obtaining of either of which was not only entirely feasible but essential from the standpoint of safety to other users of the airway. (FF. 23-27: R. 2535-2536.)

Thus the KRAM penetration could have been carried out under IFR, with resultant elimination of danger to civilian traffic. (8 Rep. Tr. 1045.) Nellis control could have obtained IFR information from the CAA at any time. (10 Rep. Tr. 1261, 1262, 1269; 20 Rep. Tr. 2619, 2620.) Had such been done, the subject accident would not have occurred. (15 Rep. Tr. 2013-2014.) The Air Force knew that it was desirable from the standpoint of safety, to obtain an IFR traffic separation; it knew that reliance upon visual observation (VFR) was a hazardous procedure. (15 Rep. Tr. 2010-2014.)

The reasons given by the Air Force for not utilizing procedures which would effect a separation from the constant stream of civilian traffic along Victor 8 were wholly reasons of expediency. Utilization of IFR procedures or clearances would, it seems, have caused delay.

(15 Rep. Tr. 1993, 2012.) One suspects that this is but an oblique way of saying that the obtaining of civilian air traffic information was simply too much trouble,* although the Air Force had conducted experiments which indicated that the obtaining of IFR clearances was "relatively easy." (16 Rep. Tr. 2104.)

In sum, the Air Force *intentionally* failed to secure IFR clearance or traffic information as to commercial traffic. (Cf. FF. 26, 30, 55, 66, 69: R. 2536, 2537, 2541, 2544, 2545.) It *intentionally* failed to utilize available radio facilities for the requesting of an IFR clearance. (Cf. F. 27: R. 2536.) It *intentionally* failed to make inquiry as to airline traffic on Victor 8. (Cf. F. 28: R. 2536.) It *intentionally* failed to design the KRAM procedure so as to avoid Victor 8 at altitudes regularly used by en route commercial passenger planes. (Cf. FF. 49, 61: R. 2540, 2543-2544.) It *intentionally* failed to make a study of commercial traffic in the area and to design and utilize the KRAM procedure in the light of such study. (Cf. F. 50: R. 2541.) It *intentionally* failed to coordinate the KRAM procedure with United or other commercial carriers utilizing Victor 8. (Cf. F. 51: R. 2541.) And, last but not least, it *intentionally* established and used the KRAM procedure under VFR conditions, the result being the intentional utilization of a dangerous (29 Rep.Tr. 3938) and hazardous procedure due to the deadly combination of high speed and both inherent and fostered limitations on visibility. (Cf. FF. 47, 47a-47g, 67: R. 1539-1540, 2544-2545.)

This situation leads to but one conclusion: upon the facts found and the evidence, without substantial

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*The Air Force was, however, meticulous in providing for traffic separation and clearances as between Air Force planes alone. (F. 22: R. 2535), and *after* the subject collision, orders were issued that IFR clearances be obtained. (20 Rep. TR. 2600-2601.)

conflict, contained in the record, the Government stands convicted of reckless, wanton or wilful misconduct under every authority later to be cited herein. Certainly no other conclusion may be drawn other than that the Air Force not only carelessly, but *recklessly* caused the jet to be operated in a manner so as to endanger the life and property of others, to say nothing of the lives of its own personnel and the destruction of its own property. This is reckless or wilful misconduct, as well as being a direct violation of Section 60.12 of the Civil Air Regulations and Section 493.130 of the Revised Statutes of Nevada, to each of which reference is later made herein in this connection. Furthermore, this Court may properly so hold, as a matter of law, upon the facts found and upon the uncontradicted evidence to which we have referred. Cf. *Alabam Freight Lines v. Phoenix Bakery, Inc.,* 64 Ariz. 101, 166 P.2d 816, where the court did precisely this upon the appeal; and see, also, *Missouri, K. & T. Ry. v. Missouri Pacific Ry.,* 103 Kan. 1, 175 Pac. 97, where, in affirming the judgment on the basis of special jury findings as to the negligence of the defendant, the court also said, in the light of the wilful misconduct revealed by such findings:

> ". . . If it were necessary, this court could apply the law, disregard the subject of contributory negligence on the part of the plaintiff, and direct judgment for the plaintiff." (175 Pac. at p. 104.)

So much for the reckless or wilful misconduct on the part of the Government. We now turn to a consideration of the law applicable to the facts revealed by this record.

3. The Right to the Allowance of Indemnity in Favor of One Exposed to Liability to Third Persons by the Actively Negligent or the Wilful or Reckless Act of Another.

The acts causing death occurred in Nevada, and the actions were all brought under the Nevada Wrongful Death Statutes. Nev. Rev. Stats. §§ 12.090, 41.080, 41.090.* The law of Nevada therefore governs as to all matters of substantive law involved, although California is, of course, the forum state.** This is true both as to the diversity aspects of the present actions, *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, and as to the claims and cross-claims of the plaintiffs and United, respectively, against the Government, 28 U.S.C. § 1346(b). So far as we are aware, Nevada has not spoken with reference to the subject of indemnity by way of relief over as against a (we here assume) joint or concurrent tortfeasor. Reference may therefore properly be had to applicable general law as embodying what this Court may properly declare the law of Nevada to be. Since most indemnity cases have had to do with relative delinquencies in the field of negligence, as distinguished from reckless or wilful misconduct, we will first treat of the cases dealing with active negligence vis-a-vis (a) passive negligence or (b) no negligence in fact, on the part of the party exposed to liability by the act of the active tortfeasor.

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*These and other pertinent statutes are set forth in Part III of the Appendix.

**See *Ryan v. North Alaska Salmon Co.,* 153 Cal. 438, 95 Pac. 862; *Loranger v. Nadeau,* 215 Cal. 362, 10 P.2d 63; *McManus v. Red Salmon Canning Co.,* 37 Cal. App. 133, 169 Pac. 438; *DuBois v. Owen,* 16 Cal. App. 2d 552, 60 P.2d 1019; *Rubin v. Schupp,* 9 Cir., 127 F.2d 625; *Wallace v. Rankin,* 9 Cir., 173 F.2d 488.

a. One Not Negligent at All or Whose Negligence Is at Most Passive in Its Nature, May and Should Be Awarded Indemnity Against a Party Whose Active and Primary Negligence Exposes Him to Liability in Favor of a Third Person.

In this regard the rule is well settled that where (1) the parties defendant are not *in pari delicto,* and (2) an injury or death results from the act of one party whose negligence is the *primary, active* and *proximate* cause thereof, and another party, who is either *not negligent in fact* or whose negligence, if any, is *remote, passive* and *secondary,* is nevertheless exposed to liability by the acts of the first party, the first party may in such circumstances be held liable to the second party for the full amount of damages incurred by the second party as a result of such acts. *Washington Gas Light Co. v. District of Columbia,* 161 U.S. 316, 327; *Snohomish County v. Great Northern Ry., supra,* 9 Cir., 130 F.2d 996, 1000; *United States v. Savage Truck Line, Inc.,* 4 Cir., 209 F.2d 442, 446; cf. *Great Northern Ry. v. United States,* D.C. Mont., 187 F.Supp. 690; and see other cases cited *infra* in this section of this brief.

The indemnity of which we speak is involuntary or perhaps quasi-contractual: it is not the product of express contract. It is rather the product of a principle, equitable in concept if not in doctrine, which puts "the ultimate loss upon the one principally responsible for the injury done," *Union Stockyards Co. v. Chicago, B. & Q. R.R.,* 196 U.S. 217, 224; and which calls for an inquiry "into the relative delinquency of the parties," *Snohomish County v. Great Northern Ry., supra,* 9 Cir., 130 F.2d at p. 1000, in order to determine "the primary cause of the harm," *Banks v. Central Hudson Gas & Elec. Corp.,* 2 Cir., 224 F.2d 631, 634.

The following cases illustrate applications of the rule in circumstances which are of interest here:

Snohomish County v. Great Northern Ry., supra, 9 Cir., 130 F.2d 996: trainwreck resulting from washout caused by active negligence of county in the manner of construction and maintenance of road and culvert adjacent to and overlying railroad right-of-way—railroad held passively negligent in failure to exercise ordinary care in inspection of its roadbed and adjacent property. In these circumstances this Court upheld the allowance by the District Court of indemnity to the Great Northern by way of reimbursement to it of amounts paid in settlement of death and injury claims made on behalf of its employees and government mail clerks on board the train at the time of the wreck.

Great Northern Ry. v. United States, supra, D.C. Mont., 187 F.Supp. 690: Government mail clerk negligently threw mailbag from train to wrong dispatch area at station, injuring business invitee of railroad.* Indemnity from Government for amount of settlement with invitee allowed to railroad, as to which no negligence was found, see 187 F.Supp. at pp. 696-697. Cites *Snohomish,* 187 F.Supp. at p. 694, n. 10. Good discussion.

United States v. Savage Truck Line, supra, 4 Cir., 209 F.2d 442; Government as shipper, negligently loaded airplanes on motor carrier truck. Carrier accepted the consignment, knowing of the faulty loading, and its driver, likewise with knowledge of same, failed to operate truck with requisite care under the circumstances, resulting in collision and death due to one of cylinders toppling over on driver of other vehicle. Indemnity allowed the United States, the court citing

*For a similar mailbag dispatch case, see *Chicago, R.I. & P. Ry. v. United States,* 7 Cir., 220 F.2d 939.

Snohomish at 209 F.2d 446, to proposition that "recovery over by way of indemnity is allowed against one by whose *active* fault the dangerous condition was created since *he* is considered to be the real author of the injury."

St. Louis-S.F. Ry. v. United States, 5 Cir., 187 F.2d 925: Government shipped leaky poison gas bombs —railroad was without fault—judgment dismissing railroad's complaint for indemnity against claims of third parties (railroad employees) against railroad reversed. Cites *Snohomish,* 187 F.2d at p. 926, n.2.

Washington Gas Light Co. v. District of Columbia, supra, 161 U.S. 316: indemnity allowed to District in face of its passive negligence in failing to discover and to remedy defective gas box placed by gas company in sidewalk.

Standard Oil Co. v. Robins Drydock & Repair Co., 2 Cir., 32 F.2d 182: indemnity allowed to oil company in face of its passive negligence in failing to inspect and remedy defective gangway supplied by drydock company whereby oil company employee was injured.

Pasquale v. Babcock, Hinds and Underwood, Inc., 6 App. Div. 2d 336, 176 N.Y.S.2d 884, aff'd 5 N.Y. 2d 799, 154 N.E.2d 577, 180 N.Y.S.2d 327: passive negligence of subcontractor in failing to observe or to warn employee of active negligence of prime contractor in constructing defective roof supports.

American Dist. Tel. Co. v. Kittleson, 8 Cir., 179 F.2d 946: building owner allowed skylight to become covered with dust. Telegraph company employee fell through the skylight, injuring a third party. Telegraph company awarded indemnity as against the building owner on theory that active negligence of the latter created the dangerous condition.

It is to be noted that the instrumentality owned by the party awarded indemnity need not be motionless or otherwise inoperative to render the negligence of such party *passive* in its character. Thus, where a railroad employee working a string of cars in switching operations is injured by the active negligence of another in impairing, by physical obstruction, the side clearance of the moving cars, the negligence of the railroad is nevertheless uniformly held to be passive in its nature despite the fact that it was engaged in a switching operation with moving cars. *United States v. Chicago, R. I. & P. Co.,* 10 Cir., 171 F.2d 377; *Gulf, Mobile & O. R.R. v. Arthur Dixon Transfer Co.,* 343 Ill. App. 148, 98 N.E.2d 783; cf. *Booth-Kelly Lumber Co. v. Southern Pacific Co.,* 9 Cir., 183 F.2d 902, where the indemnity was provided for in an express contract, but this Court indicated that the result would have been the same in the absence of contract: 183 F.2d at p. 911. In all of these impaired clearance cases there was present not only the duty of the railroad to warn its employee of the danger, but also the duty of the men in the cab to observe the obstruction and apply the brakes. Indemnity was thus clearly awarded because the party responsible for the obstruction *had created the dangerous condition which led to the injury.*

This factor is emphasized in *Chicago & N.W. Ry. v. Dunn,* 59 Iowa 619, 13 N.W. 722, where a landowner opened a gate in his fence next to a railroad, through which gate a neighbor's horse escaped and was killed by a moving locomotive. The railroad was awarded indemnity against the landowner for the damages paid by it to the owner of the horse, the holding being that the railroad was only passively negligent in failing to discover that the gate was open.

So far we have been speaking of relief over by one either not negligent at all or, at most, guilty of passive, remote or secondary negligence. And the test is, as we have seen, the relative gravity of the fault if both are at fault in some degree. Where, as it happens, the party seeking indemnity is not at fault at all, cf. *Great Northern Ry. v. United States, supra,* D. C. Mont., 187 F. Supp. 690, he is *a fortiori* entitled to the relief which he seeks. On the other hand, and as we are about to show, where the party against whom indemnity is sought is guilty of extreme fault, such as reckless or wilful misconduct, it is equally *a fortiori* that the party seeking indemnity is entitled thereto even though he may have been guilty of the lesser fault of ordinary, or one might say, contributory negligence.

With these thoughts in mind, we turn to the subject of reckless or wilful misconduct.

b. One Not Negligent at All or Whose Acts or Omissions Constitute No More Than Ordinary Negligence, May and Should Be Awarded Indemnity Against a Party Whose Reckless or Wilful Misconduct Exposes Him to Liability in Favor of a Third Person.

(i) One Who Endangers the Lives or Safety of Others by Intentional or Reckless Conduct in Disregard of Such Lives or Safety, or of His Own, Is Guilty of Reckless or Wilful Misconduct.

Reckless, wilful or wanton misconduct—the cases use the terms indiscriminately—imports something more than ordinary negligence. As said in the Restatement, Torts §500 (Reckless Disregard of Safety), comment a:

> ". . . Although conduct to be reckless must be negligent in that it is unreasonable, it must be something more than negligent. It must not only

> be unreasonable, but it must contain a risk of harm to others in excess of that necessary to make the conduct unreasonable and therefore, negligent." (p. 1294.)

And Section 500 itself defines reckless disregard of safety as follows:

> "The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him."

So, as declared in *Aiken v. Holyoke St. Ry. Co.,* 184 Mass. 269, 68 N. E. 238, this intentional, or at the very least quasi-intentional, tort is encompassed in the conduct of one who "wilfully and wantonly, in reckless disregard of the rights of others, by a positive act or careless omission exposes another to death or grave injury." (68 N. E. at p. 239.)

And in *Ziman v. Whitley,* 110 Conn. 108, 147 Atl. 370, 372, a wanton act at common law was characterized as one done in reckless disregard of the rights of others; as evincing a reckless indifference to consequences to the life, limb or health of another. Nevada's neighbor, California, defines wilful misconduct as embracing "deliberate, intentional or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom." *Emery v. Emery,* 45 Cal. 2d 421, 426, 289 P.2d 218, 221, and cases cited. The California Supreme Court has also employed the following somewhat picturesque but nevertheless apt language, as being applicable to

an automobile-guest situation, by saying in *Parsons v. Fuller,* 8 Cal. 2d 463, 66 P. 2d 430:

> "One who . . . knowingly flirts with danger and, without necessity or emergency compelling him, 'takes a chance' on killing or injuring himself or others, . . . is guilty of wilful misconduct." (8 Cal. 2d at p. 468.)

So much for general principles. Specifically, and as applicable to aircraft, the *lex loci*—that of Nevada—proscribes and defines as a gross misdemeanor the operation, in the air or on the ground or water, of an aircraft in a careless or *reckless* manner *so as to endanger the life* or property of another. Nev. R. S. 493.130. And Nevada also provides that in determining whether such operation was careless or reckless, the court shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics. Nev. R. S. 493.140. This in turn takes us back to CAR 60.12 which, as earlier pointed out, in turn also proscribes the operation of aircraft in "a careless or *reckless* manner so as to endanger the life or property of others." Thus Nevada specifically defines, in accordance with federal standards applicable to Air Force activities, the wilful and reckless operation of aricraft.

Typical acts or omissions heretofore held by various courts to constitute reckless, wanton or wilful misconduct include the following: a bus speeding over 50 miles per hour along a crowded street, resulting in a collision with a motorcycle and death to its rider, *Consolidated Coach Co. v. McCord,* 171 Tenn. 253, 102 S. W. 2d 53; an automobile speeding along a crowded street and approaching an intersection at over 40 miles per hour without reducing speed* or applying brakes until too

*Cf. 37: R. 2538 (retracted speed brakes).

late to avoid killing a pedestrian, *Ziman v. Whitley, supra,* 110 Conn. 108, 147 Atl. 370; a motor truck crossing over the center line and passing another vehicle on an S-curve near the crest of a hill, resulting in a collision with an unseen vehicle coming over the crest from the opposite direction, *Alabam Freight Lines v. Phienix Bakery, Inc. supra,* 64 Ariz. 101, 166 P.2d 816; persistence in driving over a mountain road with frequent curves at an excessive rate of speed, *Parsons v. Fuller, supra,* 8 Cal. 2d 463, 66 P. 2d 430.

The application of the principles discussed above to the conduct of the Government as revealed by the record necessarily results in the conclusion that the Government was guilty of reckless or wilful misconduct. And in so applying such principles, it is important to note that as to this phase of the case it is wholly irrelevant whether United was or was not guilty of ordinary negligence, whether active, as found by the District Court, or otherwise. This follows as a result of the principle next to be discussed.

(ii) One Guilty of Reckless or Wilful Misconduct to the Prejudice of Another May Not Set Up the Ordinary Negligence, if Any, of Such Other Party as a Defense Either to an Action or an Action Over for Indemnity Brought by Such Party.

It is settled law that where a person is seeking redress as against one guilty of wilful, wanton or reckless misconduct, he may recover even though he is himself guilty of such negligent conduct as would ordinarily bar his recovery; contributory negligence is not a defense to wilful or reckless misconduct.

In such a situation the principle has application that in the absence of voluntary and knowing assumption

of risk,* the right of recovery will not be defeated even if one is guilty of ordinary negligence as contrasted with wilful, reckless or wanton conduct on the part of the party sought to be charged. *Aiken v. Holyoke St. Ry., supra,* 184 Mass. 269, 68 N.E. 238; *Alabam Freight Lines v. Phoenix Bakery, Inc., supra,* 64 Ariz. 101, 166 P.2d 816; *Esrey v. Southern Pacific Co.,* 103 Cal. 541, 37 Pac. 500; *Ziman v. Whitley, supra,* 110 Conn. 108, 147 Atl. 370; *Kasanovich v. George,* 348 Pa. 199, 34 A.2d 523; *Consolidated Coach Co. v. McCord, supra,* 171 Tenn. 253, 102 S.W.2d 53; *Adkisson v. City of Seattle,* 42 Wash. 2d 676, 258 P.2d 461. As said in *Aiken v. Holyoke St. Ry., supra:*

> ". . . The reasons for the rule as to the plaintiff's care in actions for ordinary negligence are wanting, and at the same time the facts make the rule impossible of application. The general rule that the plaintiff's failure to exercise ordinary care for his safety is not a good defense to an action for wanton and willful injury caused by a reckless omission of duty, has been recognized in many decisions, as well as by writers of textbooks. Aiken v. Holyoke Street Railway Co., 180 Mass. 8, 14, 15, 61 N.E. 557; Wallace v. Merrimack River Navigation Express Company, 134 Mass. 95, 45 Am. Rep. 301; Banks v. Highland Street Railway Co., 136 Mass. 485, 486; Palmer v. Chicago St. L. & P. Railroad Company, 112 Ind. 250, 14 N.E. 70; Brannen v. Kokomo, G. & J. Gravel Road Company, 115 Ind. 115, 17 N.E. 202, 7 Am. St. Rep. 411; Florida Southern Railway Com-

*There is no voluntary or knowing assumption of risk here. The District Court found that United did not know of the KRAM procedure; and the evidence was that United did not know that the Air Force jets were not securing IFR traffic clearance and assumed that they were. (F. 74: R. 2547; 24 Rep. Tr. 3249, 3274; 25 Rep. Tr. 3348; 33 Rep. Tr. 4585; 34 Rep. Tr. 4640.)

> pany v. Hirst, 30 Fla. 1, 11 South. 506, 16 L.R.A. 631, 32 Am.St. Rep. 17; Shumacher v. St. Louis & Santa Fe Railroad Company (C.C.) 39 Fed. 174; 7 Am. & Eng. Enc. of L. (2d Ed.) 443, and note; Beach on Contributory Negligence (3d Ed.) §§ 46, 50, 64, 65; 2 Wood on Railroads (2d Ed.) 1452; 3 Elliott on Railroads, § 1175; 1 Thompson, Commentaries on Negligence, § 206; Cooley on Torts (2d Ed.) 810. . . ." (68 N.E. at pp. 239-240.)

And see, also, 32 Colum. L. Rev. 500, citing, to the same effect, at note 32, cases from Alabama, Illinois, Massachusetts, New York, Ohio, South Carolina, South Dakota, Tennessee, Texas and Wisconsin.

This principle has full application to a claim for indemnity. Thus in *Missouri, K. & T. Ry. v. Missouri Pacific Ry., supra,* 103 Kan. 1, 175 P. 97, the Supreme Court of Kansas applied the rule in an indemnity case where plaintiff railroad had been exposed to liability as a result of injuries suffered by its passengers in a crossing collision with a Missouri Pacific freight. Plaintiff's passenger train stopped and then proceeded over the crossing, the defendant's freight train being in view, in the belief that the latter would stop, which it did not do. Plaintiff was awarded indemnity, the court declaring that the charge of reckless and wanton disregard of safety had been made out, even though the jury did not specifically so find, thus rendering it unnecessary to pass upon the subject of the plaintiff's asserted contributory negligence. 175 P. at p. 104.

In the light of the foregoing authorities it is respectfully suggested that upon the record* the Government was guilty of reckless or wilful misconduct entitling United to indemnity despite the District Court's findings of active (ordinary) negligence on the part of the latter.

**Cf, Alabam Freight Lines v. Phoenix Bakery, Inc., supra,* 64 Ariz. 101, 166 P.2d 816.

B. Lack of Merit of the Government's Defenses to United's Claims for Indemnity.

From what has been said, it is apparent that the District Court's findings* as to active negligence on the part of United are irrelevant should this Court agree with us that the Government, on the record, was guilty of reckless or wilful misconduct. Absent such a holding, the question then comes to the fore as to whether, in the light of found active negligence on the part of the Government, United was guilty also of active negligence, or of passive negligence, or of no negligence at all, insofar as the Government is concerned. Hence, it now becomes necessary to examine the findings of negligence attributed to the airline; this on the assumption, contrary to the facts heretofore pointed out, that the Government was guilty of nothing more than active negligence.

1. The Findings as to Active, Causative Negligence on the Part of United Are Clearly Erroneous and Without Substantial Support From the Evidence.

The District Court's findings in this regard fall into two distinct categories. The first of these consist of asserted negligent omissions on the part of the crew of the DC-7 at or about the time of the collision. These were found to be the failure of the crew to see the F-100F and to initiate evasive action to avoid the same. (FF. 41, 44, 73: R. 2538-2539, 2547.)

The second category consisted of asserted negligent omissions relating to what we may term pre-collision

*To the extent that the District Court's findings adverse to United were reproduced or, in substance, duplicated in that court's conclusions of law, reference herein to given findings, as such, will be understood to refer also to such reproduced or duplicated findings as are embodied in the conclusions of law. (Cf. Conclusion of Law [IX: R. 2551.)

lack of knowledge of conditions in the Las Vegas-Nellis Field area and faulty crew training in the light of those conditions. These pre-collision omissions were found to be:

Failure of United to have knowledge of the details of the flying conditions, activities and hazards on and across Victor 8 in the Las Vegas area, including knowledge of the KRAM procedure. (F. 72: R. 2546-2547; cf. F. 71: R. 2545-2546.) In this connection the District Court also found that United did not, in fact, have knowledge of the unpublished KRAM procedure although the CAA did. (F. 58: R. 2543; F. 74: R. 2547.)

Failure to instruct or train its crews on the subject of systematically scanning for other aircraft, by leaving the manner of scanning to each flight captain. (F. 76: R. 2547.)

Failure adequately to inform and instruct its crews "relating to the dangerous operation of its aircraft through the Las Vegas area." (F. 77: R. 2547; and cf. F. 75: R. 2547.)

Paralleling its determination as to the Government, the District Court then found that the negligence of United was a proximate and concurrent cause of the collision and resulting deaths, that the accident was proximately and concurrently caused by the failure of United to exercise the ordinary care which it owed the Government and that United's negligence was active and not passive. (F. 82-84; R. 2548.)

It remains to discuss the foregoing findings in the light of the evidence and in the light of their relationship to proximate causation. And once again it is to be borne in mind that we are here dealing, not with

the duty of utmost care which United owed its passengers, but with the duty of ordinary care owed by it to one—the Government—which on the face of the record had admittedly violated its reciprocal duty in that behalf to the airline.

The key findings material to the present discussion are Nos. 44 and 73 (R. 2538-2539, 2547): the asserted failure to see and to avoid the F-100F, and to initiate evasive action with reference thereto. If, as we propose to show, the crew of the DC-7 could not have seen the descending jet in any event and properly maintained its right of way in the light of this circumstance, such pre-collision matters as lack of intimate knowledge of the Air Force's doings or lack of a standardized scanning training program, assuming that United owed the Government these duties, lose any value whatever from the standpoint of proximate causation, besides being in any event purely passive in their nature. The presumption was that the crew of the DC-7 exercised ordinary care in the circumstances present at the time and place of the collision, *Nevada R. S.* 52.070(4) *and cf. Calif. Code Civ. Proc.* §1963(4); and the question is whether or not the evidence was such as to overthrow that presumption. We propose to show that it was not; but before doing this it will perhaps be helpful to point out that when we refer to "evidence" we mean evidence as such without the benefit of any application of the doctrine of *res ipsa loquitur*.

a. Neither of the Operators of Moving Vehicles Involved in a Collision Situation Is Entitled to the Benefit of the Doctrine of Res Ipsa Loquitur as Against the Other; and This Is True Even Though One of Them Happens to Be a Common Carrier of Passengers.

Once again, we do not find that Nevada has spoken on this subject. However, the above proposition does not seem open to dispute as a matter of general law. *Sandler v. Boston Elev. R.R.,* 238 Mass. 148, 130 N.E. 104; *Bush v. Los Angeles Ry.,* 178 Cal. 536, 174 P. 665; cf. *Presser v. Dougherty,* 239 Pa. 312, 86 Atl. 854.

It follows that the findings of the District Court, as between United and the Government, to the effect that United was guilty of active negligence proximately contributing to the collision and resulting deaths must be evaluated from the standpoint of the inapplicability of the doctrine. This is to say that the sufficiency of the evidence to support the court's findings in this regard may not be aided by any inference or presumption* of causative negligence arising from the fact of the injury. With this principle in mind, we turn to a consideration of the validity of the District Court's findings as to negligence on the part of United.

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*Nevada, unlike California, seems presently inclined to hold that the doctrine of *res ipsa loquitur* gives rise to a *presumption,* rather than an inference, of negligence. Compare *Nyberg v. Kirby,* 65 Nev. 42, 188 P.2d 1006, rehrg. denied 65 Nev. 78, 193 P.2d 850, with *Ales v. Ryan,* 8 Cal. 2d 82, 99, 64 P. 2d 409, 417.

b. The Findings That the Crew of the DC-7 Negligently Failed to See and Take Evasive Action to Avoid the Air Force Jet Are Clearly Erroneous and Without Substantial Support From the Evidence.

(i) The Evidence Was, Without Substantial Conflict, That the Crew of the DC-7 Could Not See the F-100F as It Descended Upon Them; and the District Court Erred in Not so Finding and Concluding.

The day was clear, the weather fair and, in the ordinary sense, visibility was unlimited, the weather bureau reporting it to be 35 miles. (F. 9: R. 2531.) However, this does not tell the story: the range of vision upward of the crew of the DC-7, due to structural limitations of the windscreen, was limited to approximately 10° above the horizontal.

The DC-7 was cruising along Victor 8 at an altitude of 21,000 feet. (F. 43: R. 2538.) The collision occurred at about 8:30 A.M. (F. 18: R. 2534.) At 8:28 A.M. the Government jet reported departing 28,000 feet on its descent procedure. (F. 32: R. 2537.) It thus dropped some 7,000 feet to reach the collision point in about two minutes. At the point of collision, as was earlier mentioned, its angle of descent was 17°. (F. 36: R. 2538.)

In these circumstances, the extent of the field of vision of the DC-7's crew becomes crucial.* The only evidence as to this was given by the Government's deposition witness Brennan offered at trial by United.

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*Cf. the testimony of Major General Caldera to effect that a descending plane can be seen "if it is within the limits of the windscreen . . ." "if he is within your area of vision," etc. (9 Rep. Tr. 1134-1135.)

(43 Rep. Tr. 5706-5707.) This witness testified in this regard as follows:

"Q. . . . You assumed, in the case of each pilot, that is, the pilot of the jet and of the DC-7, a vertical search of 20 degrees. Is that right?

"A That is correct.

"Q *That is ten degrees above and below horizontal or at least the direction you are looking straight ahead?**

"A *That is approximately right.*

"Q Is that approximately the normal search area, the vertical search area?

"A It should be, yes. This will vary from cockpit to cockpit, because of limitations.

"Q If a plane were descending at an angle of over ten degrees, even slightly over ten degrees, it would certainly decrease the likelihood of seeing that plane, wouldn't it?

"A. Yes, if it were outside of range of scan, *it wouldn't be seen.*" (44 Rep. Tr. 5836-5837.)

As the witness also put it: "There is no point trying to look through an opaque portion of an airplane." (44 Rep. Tr. 5834.) That the jet was above the DC-7's range of vision was also attested by one of the two eyewitnesses from the ground, Allen White, a boy of 11. Allen testified as follows:

"Q Have you got any airline models like the DC-7 or Constellation or that kind?

"A Well, I have got a bomber.

"Q A bomber—that is about the same size, isn't it? Did you ever pretend you were sitting in the pilot's seat of the plane?

"A Yes.

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*Emphasis here, as elsewhere, is supplied unless otherwise noted.

"Q And just pretend for a minute you are sitting in the pilot's seat of the DC-7 and looking out ahead of you—are you aware of what the position of the jet would be as you are looking out?

"A I think it was coming down.

"Q Coming down in a dive?

"A *I think it was too high;* you would have to lean out pretty far to see it." (45 Rep. Tr. 6002.)

So, also, the witness testified that the jet was "up high," and that, before the collision:

"A Well, the vapor trail—it kind of swooped down." (45 Rep. Tr. 5998.)

This in turn accords with the court's finding that the angle of descent of the jet at time of impact was 17° or some 7° above the normal field of vision of the DC-7. (F. 36: R. 2538; cf. 42 Rep. Tr. 5608.) From this it is to be concluded, bearing in mind the closure speed of approximately 735 miles per hour (27 Rep. Tr. 3729; 44 Rep. Tr. 5782) that the crew of the DC-7 could not have seen the descending jet until practically the very instant of impact, when it was too late to take evasive action. This not only explains the failure of the DC-7 to engage in any such maneuver, but it also renders the District Court's findings of *negligent* failure to see, to avoid and to evade, clearly erroneous and without support from the evidence.

In saying this, we are not overlooking the fact that certain evidence appears in the record as to abstract sighting probabilities insofar as the crew of the DC-7 was concerned. Thus the witness Grether, Technical Director of the Behavioral Sciences Laboratory at Wright Patterson Field, Dayton, Ohio, on the assumption of unimpaired visibility, placed the time at which either craft could have identified the other as being

an airplane at 20 seconds prior to impact. (29 Rep. Tr. 3918.) But this witness, in addition, erroneously assumed a descent angle for the jet of 5° rather than the 17° angle found by the court. (28 Rep. Tr. 3776.) And the witness Brennan, upon the assumption, contrary to the fact, that the jet was within the field of vision of the DC-7, testified that the crew of the latter would have had a 50-50 chance of seeing the jet at a distance of .6 knots or 3.37 seconds prior to impact. But this latter was in any event less than the normal reaction time of 3.5 seconds which it would take an average pilot to react and initiate evasive action. (27 Rep. Tr. 3654.) These matters were wholly insufficient to create a conflict with the proven fact, that irrespective of abstract sighting probabilities, the F-100F was, down to the last second, substantially above the range of vision of the airliner. In these circumstances, the findings that the crew of the DC-7 negligently failed to see, to avoid or to evade are without evidentiary support and wholly insufficient to overthrow the presumption that the crew of the DC-7 exercised ordinary care at and immediately prior to the collision.

c. Irrelevance of the Subordinate Findings as to Lack of Knowledge on the Part of United as to the Doings of the Air Force in the Area and as to the Lack of a Standardized Training Program With Reference to Scanning; Matters of a Passive Nature if They Be Deemed to Have Been Negligent at All.

The case made by United thus was that Flight 736 was in transit along an airway established by the CAA at invitation of and by clearance granted by the CAA; that it had a perfect right to be where it was and that it had the right-of-way over the Air Force jet which

approached it, not only from the left, but from above in a flight path which was above and beyond the field of vision of the DC-7's crew. The short of it is that at and immediately prior to the collision United fully discharged the duty of ordinary care which it owed the Government.

In these circumstances the pre-collision omissions found by the District Court cease to have any significance whatever as regards the element of proximate cause. Knowledge of area conditions and hazards or not and lack of a standardized scanning program or not, there is no evidence indicating that the DC-7 crew did not use all due care at the scene of the accident. Moreover, the authorities which we have cited above clearly indicate that if these pre-collision omissions be deemed to have been negligent at all, they were clearly *passive* in their nature. And the corollary to this is that they constitute no defense to United's claim for indemnity against an *actively* negligent Government, which the District Court found the Government to be.

However, there is more to be said on this subject, particularly as regards the matter of potential hazard. The hazard was caused by the fact that the Air Force was using a procedure—the KRAM procedure—which entailed in effect a blindfolded pilot operating under visual flight rules with the function of visual observation entrusted to an instructor pilot so beset with supervisory duties within the cockpit as to practically blindfold him also, particularly in view of the high speed maneuver being executed. (FF. 47c, 47d, 63: R. 2539, 2540, 2544; 29 Rep. Tr. 3938.) (8 Rep. Tr. 970, 973, 977-978; 39 Rep. Tr. 5239, 5302; 38 Rep. Tr. 5076; F. 74: R. 2547.) In these circumstances, and certainly insofar as the Government is concerned, United had a right to rely upon the published procedures with which they were familiar. (38 Rep. Tr. 5076.)

In a word, it is strictly bootstrap to assert, as we assume the Government will assert, that United was guilty of negligence as to it in not ascertaining in advance that the Government was either negligently or recklessly utilizing dangerous or hazardous procedures in the Las Vegas-Nellis area. Whatever United's duties to its passengers may have been, the fact still remains that at all times prior to the actual wrongdoing of the Government which resulted in the collision, United had the right to assume, as against the Government, that the latter would comport itself with due care. As earlier noted, if the Government's conduct were wilful or reckless, any ordinary negligence on United's part would not avail the former in any event. But even if the Government were guilty of nothing more than active negligence, United had the right to assume, down to the moment of actual dereliction, that the Government would not transgress its own obligation to use due care. Cf. *O'Toole v. Pittsburgh & L.E.R.R.,* 158 Pa. 99, 27 Atl. 737; *Leclair v. Boudreau,* 101 Vt. 270, 143 Atl. 401; *Bradford v. Carson,* 223 Ala. 594, 137 So. 426; *Scales v. Boynton Cab. Co.,* 198 Wis. 293, 223 N.W. 836; *Gray v. Brinkerhoff,* 41 Cal.2d 180, 258 P.2d 834; *Goodwin v. Braden,* 134 Cal.App.2d 34, 285 P.2d 330.

At the trial, the passenger-plaintiffs made much of the fact that two near-misses between Air Force jets and United passenger planes had taken place in the area in 1957. The evidence was that United had reported both of these occurrences to the CAA as being the agency charged with promoting the safety of both civilian and military planes. (Ex. G-84: 20 Rep.Tr. 2675-2676; 25 Rep.Tr. 3346; 34 Rep.Tr. 4662.) Even if we indulge in the unlikely assumption that United owed the Government the duty of suggesting that the latter mend its ways, that duty was duly performed through the appropriate channel. (34 Rep.Tr. 4662.)

As for knowledge on the part of United pilots as to hazardous conditions in and around Nellis, the pilots were of course aware that the latter was a jet air base. (38 Rep.Tr. 5076.) But this does not suggest any basis for a finding or holding that, as to the Government, United was put on notice or inquiry that Nellis was utilizing a hazardous secret procedure which both the Air Force and the CAA were either deliberately or negligently failing to reveal to the airlines. *The duty ran entirely in the other direction,* so far as the Government was concerned.

Lastly, as to the lack of a standardized scanning program. This is answered by what has been said. The United pilots did not see because they could not see in time to avert the collision. Thus the question of ordinary care on the part of United vis-a-vis the Government inevitably comes down to the question of what took place immediately prior to and at the time of the collision. From this it follows that each of what we have termed the pre-collision omissions on the part of United necessarily disappear insofar as the chain of causation is concerned, even if we assume that United owed the Government any duty other than to operate its airliner in an ordinarily careful manner as it passed through the Nellis-Las Vegas area. And, it must be remembered, even a breach of this duty will not avail the Government if, as the findings and evidence clearly reveal, the Government was guilty of reckless and wilful misconduct at and prior to the collision.

So much for the merits of United's claim against the Government. We next turn to the refusal of the District Court to permit United to seek indemnity against the Government in the 9 government employee cases.

II.

THE DISTRICT COURT ERRED, IN THE 9 GOVERNMENT EMPLOYEE CASES, IN DENYING TO UNITED THE RIGHT TO SEEK INDEMNITY FROM THE GOVERNMENT AND IN DISMISSING UNITED'S CROSS-CLAIMS SEEKING SUCH RELIEF.

United sought, by cross-claim, indemnity from the Government in each of the 9 government employee cases. In each of those cases its cross-claim was dismissed* by the District Court on the ground that Section 7(b) of the Federal Employees' Compensation Act, 5 U.S.C. § 751 et seq., 757(b) precluded any liability of the United States by reason of an injury to an employee covered by that section. The District Court construed the statute in question as constituting either a denial or in any event a withdrawal of the consent to sue the Government otherwise evidenced by the Federal Tort Claims Act. See, in this latter regard, *United States v. Yellow Cab. Co., supra,* 340 U.S. 543.

Section 7(b) of such Act, 5 U.S.C. 757(b) provides that the liability of the United States under the Act for

> "injury or death of an employee shall be exclusive and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and *anyone otherwise entitled to recover damages from the United States* . . . on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by

*See Appendix, Part II, record citations, orders dismissing cross-claims of United against Government, government employee cases.

proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute. . . ."

The question here presented centers on the coverage of the words "and anyone else entitled to recover damages from the United States . . ." Does or does not this language refer to unrelated third parties—unrelated in the sense of not being reasonably related, *ejusdem generis,* to the categorization immediately preceding it: "the employee, his legal representative, spouse, dependents, next of kin, . . ."? And, specifically, does it or does it not refer to, or include, a third person seeking to impose a liability over upon the Government for a tortious act of the latter whereby such third party was itself exposed to liability in favor of the government employee?

This question has been put at rest, in favor of the imposition of the liability over upon the Government, by the combined effect of the decisions of the Supreme Court in *Weyerhaeuser S.S. Co. v. United States,* 372 U.S. 597 and in *Treadwell Construc. Co. v. United States,* per curiam opinion, 372 U.S. 772.

Weyerhaeuser was an admiralty collision case wherein the Government claimed that the steamship line came literally within the above-mentioned language of Section 7(b) and hence was not entitled to include in its (divided) damages against the Government, the amount which it had paid in settlement of the claim of a government employee injured in the collision. The Court held, contrary to the Government's contention, that the scope of the divided damages rule in mutual fault collisions was unaffected by the language in question. In the course of arriving at its decision, the Court said:

". . . The purpose of § 7(b), added in 1949, was to establish that, as between the Government

> on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. *There is no evidence whatever that Congress was concerned with the rights of unrelated third parties,* much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases." 372 U.S. at p. 601; (Emphasis added.)

The foregoing language is clear; nevertheless, it might be claimed that the decision is susceptible of the interpretation that it has application only to admiralty cases as regards their divided damages aspect. This doubt as to the scope of the holding has been removed, however, by the per curiam reversal of the Third Circuit decision in *Treadwell Construc. Co. v. United States, supra,* 372 U.S. 772, and its remand to the District Court for the Western District of Pennsylvania "for further consideration in light of *Weyerhaeuser S. S. Co. v. United States,* 372 U.S. 597."

Treadwell was a diversity tort action wherein a government employee sued a contractor for injuries sustained when a tank exploded. The contractor brought the Government in by filing a third party claim against it for indemnity or contribution, thus taking action similar to that of United here. The District Court entered judgment for contribution in favor of the contractor and against the Government. The Government appealed to the Third Circuit and won a reversal and remand with directions to dismiss the cross-claim. The Court of Appeals held that the effect of the language of Section 7(b) to which we have above referred was to withdraw whatever consent the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1402(b), 2402 and 2674, considered alone, would otherwise give to the imposi-

tion of tort liability upon the Government on account of injury to an employee subject to the Compensation Act. The court thus attempted to distinguish the holding in *United States v. Yellow Cab Co., supra,* 340 U.S. 543, with reference to the right generally to impose a liability over as against the Government. In its decision the Third Circuit relied in part upon the holding of this Court in *Weyerhaeuser,* 294 F.2d 179. The Supreme Court, as earlier mentioned, then granted certiorari and reversed *Treadwell* "in the light of" its decision in *Weyerhaeuser.*

In these circumstances, only one conclusion may be drawn. This is that in a general tort action, such as the present, the right of a third person, subjected to a claim of a government employee covered by the Federal Employees' Compensation Act, to impose a liability over upon the Government is unimpaired by the language of Section 7(b) of that Act.

It follows that the District Court committed reversible error in denying to United the right to seek indemnity from the Government in the 9 government employee cases.

The foregoing completes United's case for indemnity against the Government on this appeal. It is respectfully urged that its case on the merits has been fully made out; that the conduct of the Government, its "relative delinquency," was either dangerously reckless or at the very least, actively negligent as compared with what was, at the very most, no more than passive negligence on the part of United; and that, as a result of the high degree of care which United owed to its passengers, it has been exposed to liability in a setting where the sole or at any rate the primary fault was that of the Government.

As for the refusal of the District Court to permit United to proceed with its case for indemnity in the

9 government employee cases, it is respectfully urged that this situation has now been clarified, adversely to the District Court's views, by the *Weyerhaeuser* and *Treadwell* decisions of the Supreme Court to which we have referred to above.

We now turn to a consideration of United's case as regards its appeals from the judgments in favor of the passenger-plaintiffs.

III.

THE DISTRICT COURT ERRED IN RENDERING AND ENTERING THE JUDGMENTS IN FAVOR OF THE PASSENGER-PLAINTIFFS AND AGAINST UNITED.

As earlier noted, the case of the plaintiffs in the *Wiener* cases against United was tried to a jury, which returned a general verdict in favor of the plaintiffs and against the airline on the issue of liability. (55 Rep.Tr. 7422-7423.) In support of such general verdict it may properly be assumed that the same embodies implied findings by the jury as to negligence on the part of United similar in substance and effect to those made expressly by the District Court on the issues submitted to it, all as heretofore discussed herein. These include, it will be recalled, operational negligence on the part of the crew of the DC-7 in failing to see and to take evasive action to avoid the Government jet, on the one hand, and, on the other, what we have earlier termed pre-collision negligence in the failure of United to acquaint itself with the details as to conditions and hazards in the Nellis-Las Vegas area, including its failure to familiarize itself with the details of the unpublished KRAM procedure and its failure to institute an appropriate scanning program as a part of its pilot training. Furthermore, implicit in the general verdict is also the further finding by the jury that each of the foregoing acts or omissions

constituted a proximate cause of the collision and resulting deaths.

Subsequent to the consolidated trial as to the issue of liability in the *Wiener* cases and subsequent to the granting of the motions for summary judgment in favor of the plaintiffs as to such issue in the Nevada cases, about which more will be said later, the District Court entered judgment in all 31 cases in favor of the respective plaintiffs and against United. Such judgments were, in the *Wiener* cases, predicated upon the verdict finding liability as to United, and in the Nevada cases upon the ground that the judgments in the *Wiener* cases were *res judicata,* by way of collateral estoppel, as to the issue of liability as determined by that verdict. The judgments in all 31 cases were thus predicated, directly or indirectly, upon the verdict in the *Wiener* cases with the result that, if such verdict was against law, the judgments in all 31 cases will necessarily fall with it.

A. The Verdict Finding Liability Against United in the Wiener Cases Was Against Law.

This is so for several reasons which follow.

1. **The Implied Finding of the Jury That the Crew of the DC-7 Was Negligent in Failing to See and to Take Evasive Action to Avoid the Air Force Jet and That Such Negligence Was a Proximate Cause of the Collision and Resulting Deaths Is Clearly Erroneous and Without Substantial Support From the Evidence.**

This follows for the reasons earlier given at pages 53-56 hereof. If, as the evidence showed without substantial conflict, the crew of the DC-7 could not see the F-100F until the instant before impact, they were not guilty of operational negligence at all, irrespective of the high standard of care to which the passengers

were entitled. So also, this element of negligence, so erroneously found by the jury to exist, necessarily ceases to have any effect as a proximate cause of the collision and ensuing deaths.

2. **The Implied Finding of the Jury That the Pre-Collision Omission of United to Establish a Standardized Program of Scanning Instruction Was Negligent and a Proximate Cause of the Collision and Resulting Deaths Is Clearly Erroneous and Without Substantial Support From the Evidence.**

This also follows because if, as the evidence clearly shows, the relative positions of the two planes was such that the crew of the DC-7 could not see the jet, no amount of proficiency in scanning would have averted the accident.

This leaves the matter of the failure of United to familiarize itself and acquaint its crews with the *details* of the flying activities and hazards in the Las Vegas-Nellis area, including the details of the KRAM procedure.

3. **The Implied Finding of the Jury That the Pre-Collision Omission of United to Familiarize Itself and Acquaint Its Crews With the Details of the Flying Conditions and Hazards in the Las Vegas-Nellis Area, Including the Details of the KRAM Procedure, Was Negligent and a Proximate Cause of the Collision and Resulting Deaths Is Clearly Erroneous and Without Substantial Support From the Evidence.**

The evidence was that United had knowledge of the *general* flying conditions and hazards in the area, including the published procedures of the Air Force, but that it did not, in fact, have knowledge of the details

of KRAM. (Cf. F. 72, 74: R. 2546-2547; 38 Rep. Tr. 5076.)

Since the KRAM procedure was here the culprit, from the standpoint of Nellis Air Force Base operations, the question narrows down to whether United owed its passengers the duty of making inquiry as to the details of this undisclosed procedure of the Air Force.

a. A Common Carrier of Passengers Is Under No Duty to Foresee and Provide Against Casualties Which Are of a Character Not Reasonably to Be Anticipated or Which Have Not Before Been Known to Happen.

This principle is well settled and has been applied to a variety of circumstances such as injuries received due to the acts of fellow passengers, *Pruett v. Southern Ry.,* 164 N.C. 3, 80 S.E. 65; *Thompson v. Monongahela Ry.,* 99 W.Va. 207, 128 S.E. 110; *Cary v. Los Angeles Ry.,* 157 Cal. 599, 108 P. 682, an injury received from an extraneous source after failure of the carrier to stop and pick up the passenger, *Stephens v. Oklahoma City Ry.,* 28 Okla. 340, 114 P. 611 and an injury received from a wreck due to a washout caused by unprecedently heavy storm waters, the track appearing nevertheless to be in a safe condition, *Morris v. Southern Pacific Co.,* 168 Cal. 485, 143 Pac. 708.

Much was said at the trial about near-misses between Air Force planes and passenger airliners, including two such episodes in the Las Vegas-Nellis area involving United passenger planes. These, in line with United's standard practice, were promptly reported to the CAA. (Ex. G-84: 20 Rep.Tr. 2675-2676; 25 Rep.Tr. 3346; 34 Rep.Tr. 4662.)

Unhappily, near-misses with passenger airliners do not appear to be any novelty in Air Force operations

(36 Rep.Tr. 4783, 4812), although at one time, in 1953, the Air Force agreed to cooperate with the air lines in a safety program. (29 Rep.Tr. 3995-3998.) These near-misses, however, were not the product of simulated instrument practice let-downs, such as the KRAM procedure; they were the product of VFR flying in VFR weather, wholly without the concept of a blindfolded student pilot accompanied by an instructor whose preoccupations with cockpit duties were such as practically to blindfold him also.

There was nothing in VFR flying, as such, and with which the whole air line industry, and particularly its pilots, were familiar (24 Rep.Tr. 3201, 33 Rep.Tr. 4469) to suggest to that industry that the simulated instrument let-downs per the KRAM procedure (first used May 10, 1957: 8 Rep.Tr. 951) were being employed without instrument clearance; the assumption, and a reasonable one, was precisely the opposite. (33 Rep.Tr. 4585-4586; 34 Rep.Tr. 4640; 36 Rep.Tr. 4896; 38 Rep.Tr. 5095.)

The short of it is that *none* of the near-misses related to a simulated instrument flight under VFR conditions and without IFR control. And, this being the case, and without in the least seeking to impugn the infallibility of hindsight, it is respectfully urged that there is nothing in this record which supports the implied finding that United was under a duty to its passengers to inquire as to an undisclosed procedure of the Air Force wholly at variance with standard methods of accepted flying procedure. And the fact that the CAA had agreed to the use of this procedure by the Air Force without notifying the air lines (8 Rep.Tr. 973, 977-978) simply makes the matter worse. If the finding here under attack is right, there devolves upon the entire commercial air transport industry the duty of

keeping the Air Force and its numerous bases throughout the country under constant surveillance in order to ascertain whether the latter is, sub rosa, deviating from accepted and standard practices in aviation. It is respectfully urged that such an onerous burden as this is far above and beyond even the high duty of care imposed upon a carrier in favor of its passengers.

In such circumstances it is further respectfully urged that the findings that the failure of United to ascertain and disseminate the details of KRAM constituted proximately causative negligence on the part of United are clearly erroneous and without substantial support from the evidence.

So much for the jury's implied findings as to specific negligent acts or omissions, which we have assumed paralleled those made by the District Court as between United and the Government. There remains to be discussed, however, the most prejudicial implied finding of all: the finding that the collision and resultant deaths were proximately caused by some unspecified negligent act or omission on the part of United. This implied finding, implicit in the general verdict against United, was the direct product of the court's instruction as to the applicability of the doctrine of *res ipsa loquitur*. If, as we propose to show, the District Court erred in this respect, the finding in question cannot stand.

4. **The Implied Finding of the Jury That the Collision and Resultant Deaths Were Proximately Caused by Some Unspecified Negligent Act or Omission on the Part of United Was Clearly Erroneous as Being Predicated Upon the Drawing of an Inference Under the Doctrine of Res Ipsa Loquitur Which as a Matter of Applicable Law the Jury Was Not Entitled to Draw.**

a. THE DISTRICT COURT ERRED IN ITS INSTRUCTIONS WITH REFERENCE TO THE DOCTRINE OF RES IPSA LOQUITUR.

(i) In Giving Any Instruction With Reference to the Doctrine at all;

(ii) In Refusing to Instruct That, if the Doctrine Had Application Under Applicable Law, it Could Only Apply in the Event the Jury Found that United Was in Exclusive Control of the Instrumentality Causing the Accident.

At request of the plaintiffs, the court gave an instruction* on the doctrine of *res ipsa loquitur* which, in pertinent part, was as follows:

> "From the happening of the mid-air collision involved in this case, *an inference arises that a proximate cause of the occurrence was some negligent conduct on the part of the defendant United Air Lines, Inc.* This inference is a form of evidence, and *unless there is contrary evidence sufficient to meet or balance it,* the jury should find in accordance with the inference." (55 Rep.Tr. 7324; Emphasis added.)

Prior to the time when the jury retired to consider its verdict (55 Rep.Tr. 7362), counsel for United ob-

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*The instruction is somewhat long, and for this reason we have set it forth *totidem verbis* in the Appendix, Part IV.

jected to the giving of any instruction on the subject of *res ipsa loquitur,* thus:

"THE COURT: In other words, you except to the giving of the res ipsa loquitur instruction on the ground it is not applicable?

"MR. ROTCHFORD: On that ground alone, that is all.

"THE COURT: That exception is overruled." (48 Rep.Tr. 6381.)

* * * * *

"THE COURT: Then your exception to the court's res ipsa instruction now?

"MR ROTCHFORD: Only on the one ground.

"THE COURT: Only on the ground that the doctrine doesn't apply." (48 Rep.Tr. 6427.)

The objection to the foregoing instruction having been overruled, United's counsel proposed the following:

"One of the questions for you to decide in this case is whether the accident involved occurred under the following circumstances:

"First, that it is the kind of accident which ordinarily does not occur in the absence of someone's negligence;

"Second, that it was caused by an agency or instrumentality in the exclusive control of the defendant.

"If and only in the event that you should find these conditions to exist, you are instructed as follows." (R. 2144-B-2.)

This instruction was refused by the District Court and United duly excepted. (48 Rep.Tr. 6439.)

This situation raises two questions: First, if under applicable law the doctrine of *res ipsa loquitur* has no application at all to a collision case, even at suit of a

passenger against a carrier, the giving of the first instruction with or without the second clearly constitutes prejudicial and reversible error. Its effect was to shift to United the burden of repelling an improperly drawn inference of causative negligence. This in turn means that the giving of the instruction amounted to nothing less than an instruction to return a directed verdict against United in a case where the existence or non-existence of causative negligence was all important. In this connection, it will be recalled, United only proposed the second instruction *after* its objection to the giving of any *res ipsa* instruction at all had been overruled.

In the second place, the effect of the court's giving the first instruction and refusing the second, was in any event to eliminate the ingredient of exclusive control of the causative instrumentality as a requirement of the applicability of the *res ipsa* doctrine. If the court, under applicable law, was wrong in this also—and we propose to show that it was—the effect of giving the first instruction without the second was once again to shift the burden to United of repelling an improperly drawn inference of proximately causative negligence, which once again amounted to directing a verdict against United. That such constituted prejudicial and reversible error is once again not open to question if, under applicable law the element of exclusive control of the injury-causing instrumentality constitutes an ingredient essential to the applicability of the doctrine.

The solution to these problems lies in the field of choice of law as between that of Nevada, the place of the collision and resulting deaths, and that of California, the forum state. California applies the *res ipsa loquitur* doctrine in favor of the passenger against the carrier in a collision case. *St. Clair v. McAlister,* 216

Cal. 95, 13 P. 2d 924; *Smith v. O'Donnell,* 215 Cal. 714, 12 P. 2d 933. Nevada, on the other hand, does not appear to have spoken on this subject. Significantly, however, Nevada has never abandoned the concept that exclusive control of *the* instrumentality causing the injury is a prerequisite to the applicability of the doctrine, *Nyberg v. Kirby,* 65 Nev. 42, 188 P. 2d 1006, rehrg. den., 65 Nev. 78, 193 P. 2d 850, while, conversely, California has. *Ybarra v. Spangard,* 25 Cal.2d 486, 154 P.2d 687.

In these circumstances it becomes material to determine which law was and is here controlling: the *lex loci,* that of Nevada, or the *lex fori,* that of California.

b. The Law of Nevada Governs as to Whether and to What Extent and With What Results the Doctrine of Res Ipsa Loquitur Has Application to the Instant Cases.

The cases of the passenger plaintiffs vis-a-vis United were diversity cases and as such were governed in the first instance by the substantive laws of the forum state: California. *Erie R.R. v. Tompkins, supra,* 304 U.S. 64. The state laws and decisions in the field of conflict of laws are substantive in their nature and hence a federal court sitting in California is required to follow California laws and decisions in that field. Cf. *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487; *Jones v. Weaver,* 9 Cir., 123 F.2d 403. While, concededly, California regards the *res ipsa* doctrine as procedural—as a matter of circumstantial evidence—when the doctrine is applicable *under California law* to a cause of action *arising in California, Ybarra v. Spangard, supra,* 25 Cal.2d 486, 489, 154 P.2d 687, 689; cf. *Orr v. Southern Pacific Co.,* 9 Cir., 226 F.2d 841, 843, this does not at all follow in a choice

of law situation. Rather, in such circumstances a California court will follow the substantive law of the foreign jurisdiction in which the cause of action arises. Cf. *Ryan v. North Alaska Salmon Co., supra,* 153 Cal. 438, 95 Pac. 862; *Loranger v. Nadeau, supra,* 215 Cal. 362, 10 P.2d 63; *McManus v. Red Salmon Canning Co.,* 37 Cal.App. 133, 173 Pac. 1112. And since this Court is called upon to follow the substantive conflict of laws decisions of the California courts, cf. *Jones v. Weaver, supra,* 9 Cir., 123 F.2d 403, the question is whether or not a California court, applying its own principles relative to the conflict of laws, would hold the doctrine of *res ipsa loquitur,* as applicable to a tort cause of action arising in Nevada, to be substantive under the laws of the latter state. Since the California courts have not, to our knowledge, spoken as to this question, this Court, in effect looking through the eyes of a California court, is therefore called upon to determine, from the application of general law in the field of conflict of laws, whether the application of *res ipsa* is substantive or merely procedural under the laws of Nevada.

Unhappily, Nevada has not spoken on this subject either. As earlier noted, it seems *inclined* to hold that the doctrine of *res ipsa* gives rise to a *presumption,* which is *substantive* as affecting the burden of proof, rather than an inference; but it has not so held. See discussion in this regard in *Nyberg v. Kirby, supra,* 65 Nev. 42, 188 P.2d 1006, 1018-1022, culminating in the conclusion that, on the facts at bar, it was not necessary to decide as between the two conflicting concepts.

The problem must, therefore, be decided without substantial aid from Nevada. There are, however, two clear-cut conflict of law decisions in the federal jurisdiction which indicate very clearly that in such a

situation as the present *res ipsa* should be applied under the *lex loci* as being substantive in its nature.* These are the cases of *Lachman v. Pennsylvania Greyhound Lines,* 4 Cir., 160 F.2d 496 and *Smith v. Pennsylvania Central Airlines Corp.,* D.C.D.C., 76 F.Supp. 940.

In each of these cases the forum jurisdiction, Virginia in the one, with reference to a Maryland accident, and the District of Columbia in the other, with reference to a West Virginia airplane crash, held, as does California, that the law of the place of injury governs in tort cases.

In *Lachman* the question arose as to the refusal of the District Court sitting in Virginia to give a *res ipsa loquitur* instruction patterned upon the law of Maryland. Holding that the instruction should have been given, the Court of Appeals stated:

> "The rule of res ipsa loquitur is not a rule relating to the burden of proof and its application does not result in shifting the burden of proof. Sweeney v. Erving, 228 U.S. 233, 238, 33 S.Ct. 416, 57 L.Ed. 815, Ann.Cas. 1914D, 905, and following notes: Ann.Cas. 1914D, 908, 16 L.R.A., N.S., 527, L.R.A. 1916A, 930, 42 A.L.R. 865, 59 A.L.R. 486. It does, however, relate to the 'general obligation, imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action'; and if 'proof of plaintiff's freedom from fault is a part of the very substance of his case,' on the same principle, it must be held a matter of substance that proof of the occurrence of injury will or will not justify a finding of liability on the ground of negligence. It would seem, therefore, that we must look to the

*Accord, as to *res ipsa* being substantive, per *Erie R.R. Co. v. Tompkins, supra,* 304 U.S. 64, there being present, however, no question as to conflict of laws: *Hagan & Cushing Co. v. Washington W. P. Co.,* 9 Cir., 99 F. 2d 614, 616.

> law of the State in order to determine whether the doctrine of res ipsa loquitur should be applied in the pending case. Where a cause of action arises in one state and the action is brought in another state, a question of conflict of laws arises, and upon such a question, as we have seen, the federal court in a diversity case follows the law of the state in which it sits. It thus seems clear that plaintiff's substantive rights in the instant case will be governed by the law of Maryland, since it is well settled in Virginia that liability for tort depends upon the law of the place of injury. C.I.T. Corporation v. Guy, 170 Va. 16, 195 S.E. 659; Sutton v. Bland, 166 Va. 132, 184 S.E. 231." (160 F.2d at pp. 499-500.)

In *Smith v. Pennsylvania Central,* the question arose on a motion to strike from the complaint certain allegations seeking to invoke *res ipsa.* The court stated, speaking through Judge Holtzoff:

> "The doctrine of res ipsa loquitur lies in the field of substantive law rather than in the realm of procedure, Lachman v. Pennsylvania Greyhound Lines, 4 Cir., 160 F.2d 496. Consequently the question is one of local law and not of Federal law, Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487. In determining what law governs this matter, this Court must commence by ascertaining the local rules of Conflict of Laws governing this subject, Klaxon Co. v. Stentor Electric Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477. Under the law of the District of Columbia, the law of the State where the injury resulting in death is sustained governs the right to recover damages for wrongful death, Weaver v. Baltimore & O. R. Co., 21 D.C. 499, 501; Ormsby v. Chase, 290 U.S.

> 387, 54 S.Ct. 211, 78 L.Ed. 378, 92 A.L.R. 1499; Betts v. Southern R. Co., 71 F.2d 787, 789; Restatement, Conflict of Laws, Section 377. In view of the fact that, in this instance, the fatal accident occurred in West Virginia, the law of that State is determinative of the question whether the doctrine of res ipsa loquitur is applicable in the instant cases. Apparently this precise point has not been determined in any reported decision in West Virginia and the point is one of novel impression. It, therefore, becomes the duty of this court to ascertain the law of West Virginia on this point as a matter of principle and with the aid of such persuasive authorities as are available in the absence of any controlling ruling." (76 F.Supp. at p. 942.)

The court then went on to hold that the law of West Virginia must be deemed to encompass the application of *res ipsa* to a wrongful death action arising out of an airplane crash, citing, *inter alia, Smith v. O'Donnell, supra,* 215 Cal. 714, 12 P.2d 933.

Only one decision in the conflict of laws field with reference to *res ipsa loquitur* has been found which is at variance with the two decisions just mentioned. This is the case of *Estepp v. Norfolk & W. Ry.,* 6 Cir., 192 F.2d 889: an Ohio wrongful death case tried in Kentucky. It was there held that the law of the forum, Kentucky, governed the applicability of *res ipsa.* The sole authority cited to this proposition was Section 595 of the Restatement on Conflict of Laws, which states that the law of the forum governs the proof of facts alleged and also presumptions and inferences to be drawn from the evidence. If by its reference to Section 595 the Sixth Circuit sought to imply, without discussion, that the question of the applicability of *res ipsa* is procedural in a conflicts

case, it is respectfully suggested that that court wholly failed to come to grips with the question so clearly dealt with in both *Lachman* and in *Smith v. Pennsylvania Central.*

The question now remains whether a California court, in dealing with the conflict of laws question here under discussion, would lend weight to the fact that in non-conflict situations, which is to say as regards California tort causes of action, California treats *res ipsa* as a rule of circumstantial evidence, hence procedural and thus to be governed by the law of the forum.

It should not, in the setting of these cases, for a very obvious reason. We are here dealing with a situation where a trial court told the jury, in effect, that the evidence was sufficient for them to draw an inference of causative negligence and hence to find liability, absent explanation by the defendant, under the wrongful death statutes of *Nevada.* And as to this kind of a situation it is well settled, in the train of *Erie R.R. v. Tompkins,* that the sufficiency of the evidence to establish a cause of action—here a Nevada cause of action—is a matter of *substantive* law, and hence, in this setting referable to Nevada law, under the California conflicts principle that the *lex loci* governs foreign tort causes of action. *Stoner v. New York Life Ins. Co., supra,* 311 U.S. 464, 467-468; *Cooper v. Brown,* 3 Cir., 126 F.2d 874, 877; *Gutierrez v. Public Service Interstate Transp. Co.,* 2 Cir., 168 F.2d 678, 679-680; cf. *Gulf, M. & O.R.R. v. Freund,* 8 Cir., 183 F.2d 1005.

This brings us to the law of Nevada as regards the doctrine of *res ipsa loquitur.*

c. Under the Law of Nevada the Doctrine of Res Ipsa Loquitur Has No Application to Any Tort Not Shown to Have Been Caused by an Instumentality in the Sole or Exlusive Control of the Defendant.

As earlier mentioned, California has abandoned the element of exclusive control in *res ipsa* cases, and particularly so in cases of collisions between vehicles. See *Ybarra v. Spangard, supra,* 25 Cal.2d 486, 154 P.2d 687, where the court said, *inter alia:*

> "Moreover, this court departed from the single instrumentality theory in the colliding vehicle cases, where two defendants were involved, each in control of a separate vehicle." (25 Cal.2d at p. 493.)

Nevada has not so departed. As far as that state is concerned, the element of exclusive control* of the instrumentality involved still remains a *sine qua non* to the applicability of the doctrine. Thus in the most recent detailed treatment of the subject, in *Nyberg v. Kirby, supra,* 65 Nev. 42, 188 P.2d 1006, 1018-1022, the Supreme Court of Nevada said:

> ". . . The factual situation in the instant case comes squarely within the definition, hereinbefore quoted, of such rule, or doctrine. *The thing which caused the injury,* namely, the automobile truck, without fault of the injured (Mrs. Nyberg), was under the *exclusive control* of the defendant, Harriet Katherine Kirby, and the injury was such as, in the ordinary course of things, does not occur, if the one having such control uses proper care; then (res ipsa loquitur) the injury arose from the defendants' want of care." (188 P.2d at p. 1021; Emphasis added.)

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*The *essential* of exclusive control, as this Court expressed it in *Trihey v. Transocean Air Lines, Inc.,* 255 F. 2d 824, 830.

The law of Nevada being controlling here, it follows that the District Court erred in refusing to instruct the jury that the doctrine could only apply in the event the latter found that United was in exclusive control of the instrumentality causing the accident. (48 Rep. Tr. 6439; R. 2144-B-2.)

This event, of course, was non-existent; from which it also follows that the District Court also erred in instructing the jury on the subject at all. (55 Rep.Tr. 7324.)

Indeed, since Nevada has not, as has California, departed from the "single instrumentality theory," this Court may properly hold that Nevada falls within the category of states (Colorado, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Pennsylvania, Virginia and Wyoming) where the rule of *res ipsa loquitur* has no application to collision cases between moving vehicles even where the party injured is a passenger seeking to recover against his carrier.*

For the reasons given above, it is respectfully urged that the District Court committed reversible error as regards its instructions given and refused, as above specified, on the doctrine of *res ipsa loquitur.* We now turn to a consideration of the District Court's action in granting motions for summary judgment in the 7 Nevada cases.

**Contra:* Arizona, Arkansas, California, Iowa, Kansas, Kentucky, Louisiana, Missouri, New Jersey, New York, Oklahoma, Rhode Island, West Virginia, and the District of Columbia. The cases pro and con are collected in *Capital Transit Co. v. Jackson,* D.C. Cir., 149 F.2d 839, 840 n.2, 841, nn. 3, 4, including *contra* the pre-*Erie v. Tompkins* decision in *Southern Pacific Co. v. Cavin,* 9 Cir., 144 F. 348, decided without reference to state law.

IV.

THE DISTRICT COURT ERRED, IN THE 7 NEVADA CASES, IN GRANTING MOTIONS FOR SUMMARY JUDGMENT AS TO THE ISSUE OF LIABILITY.

Upon the assumption that the verdicts and judgments in the *Wiener* cases constituted *res judicata* by way of collateral estoppel as to United's liability to its passengers arising out of the collision, the District Court* granted motions for summary judgment as to the issue of United's liability in each of the 7 Nevada cases. (See Appendix, Part II, record citations, orders granting motions for summary judgments, Nevada cases.) This was error.

The Nevada cases were all at issue as between the passenger-plaintiffs and United (Appendix, Part II, record citations, answers, Nevada cases), and those issues, as to liability, were in substance identical to the issues previously joined in the *Wiener* cases. These were, whether United was negligent and, if so, whether such negligence was a proximate cause of the collision. (R. 1607.)

In these circumstances the question presented is whether the judgments in the *Wiener* cases, as to all of which appeals are presently pending, may properly constitute the basis of a plea or ruling of *res judicata* by way of collateral estoppel as to an issue or issues common to both the *Wiener* and the Nevada cases.

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*The District Court being, in this instance, the District Court for Nevada. Shortly thereafter, the cases were, by stipulation, transferred to the Southern District of California where, after trial as to the issue of damages, the judgments in the Nevada cases were entered. The judgments in the *Wiener* cases were also judgments entered in California; hence the shortcomings of the latter as constituting *res judicata* or collateral estoppel are properly to be discussed with reference to California law. Cf. *Erie R.R. v. Tompkins, supra,* 304 U.S. 64.

As a matter of initial perspective, it is first to be noted that the *Wiener* judgments, though predicated upon causes of action arising in Nevada under pertinent statutes of that state, were nevertheless judgments rendered by a federal District Court, sitting in *California,* in the exercise of the diversity jurisdiction. They were, in effect, California judgments. Rev. Stats. § 905, *Stoll v. Gottlieb,* 305 U.S. 165, 170; *Caterpillar Tractor Co. v. International Harvester Co.,* 3 Cir., 120 F.2d 82, 85.

In holding the *Wiener* judgments to constitute a collateral estoppel, the District Court transgressed not one, but two, principles of law applicable to the exercise of the diversity jurisdiction. In the first place, it accorded the *Wiener* judgments *finality,* despite their pendency on appeal. Since there can be nothing which affects the substantial rights of a party more than a final judgment against him, the question of whether the *Wiener* judgments had or had not achieved finality was a question which the District Court could properly only decide under the laws of California. *Erie R.R. v. Tompkins, supra,* 304 U.S. 64. And California law is definite, and California cases are unanimous on the proposition that a judgment is not final, for purposes of *res judicata,* during the pendency of an appeal or pending the expiration of the time within which an appeal may be taken. Cal. Code Civ. Proc. § 1049;* *Brown v. Campbell,* 100 Cal. 635, 646, 35 Pac. 433, 436; *Harris v. Barnhart,* 97 Cal. 546, 550, 32 Pac. 589, 590; *Murray v. Green,* 64 Cal. 363, 369, 28 Pac. 118, 120-21; *Robinson v. El Centro Grain Co.,* 133 Cal. App. 567, 573, 24 P.2d 554, 556-57; *People v. Liv-*

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*"§ 1049. An action is deemed to be pending from the time of its commencement until its *final* determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." And see also, Cal. Code Civ. Proc. §§ 1908, 1962(6): Appendix, Part III.

ingston, 88 Cal.App. 713, 714, 263 Pac. 1036, 1037; *Fry v. Baltimore Hotel Co.,* 80 Cal.App. 415, 424-425, 252 Pac. 752, 755-56; *Howard v. Howard,* 67 Cal.App. 56, 69, 226 Pac. 984, 989-90.

The second principle of law which was overstepped by the District Court arose from the fact that in granting the motions for summary judgment it necessarily accepted the *Wiener* judgments not only as being evidence, but as being *conclusive* evidence that United had been guilty of proximately causative negligence. From this it followed, on the District Court's thesis, that United was liable to the plaintiffs in the Nevada cases without benefit of any defense whatever. If the District Court was wrong in this—and, with all respect, it was—the judgments contravened the Fifth Amendment in that it was arrived at without due process of law and in denial of equal protection of the laws.

Once again, then, the District Court was dealing with substantial rights. Once again it was required to follow state laws. Once again California law is clear: a judgment as to which an appeal is pending, or as to which the time for appeal has not expired, is *incompetent,* for want of finality, to prove such an estoppel by judgment as the District Court here held to exist. *Brown v. Campbell, supra,* 100 Cal. 635, 646, 35 Pac. 433, 436; *Murray v. Green, supra,* 64 Cal. 363, 80 Cal.App. 415, 424-425, 252 Pac. 752, 755-56; *Howard v. Howard, supra,* 67 Cal.App. 56, 69, 226 Pac. 984, 989-90.

So also, we have here a situation where the District Court's ruling had to do with the sufficiency of the evidence to establish the Nevada plaintiffs' cause of action; in fact, the effect of the court's ruling was to relieve them from the necessity of proving their cause of action save by reference to the incompetent *Wiener* judgments. Hence, once again, but for an additional

reason, substantive rights were involved. See discussion in *Cooper v. Brown, supra,* 3 Cir., 126 F.2d 874, 877, following *Stoner v. New York Life Ins. Co., supra,* 331 U.S. 464.

Of course, it is to be recognized that the expressions "substance" and "procedure" are not magic touchstones. The basic philosophy underlying *Erie v. Tompkins* was to bring about, as near as might be, a reasonable degree of uniformity of decision as between the co-existent jurisdictions within the borders of a given state and thus, among other things, to eliminate "forum shopping." As the Supreme Court said, in *Guaranty Trust Co. v. York,* 326 U.S. 99,* speaking through Mr. Justice Frankfurter:

> ". . . The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding "substance" and "procedure," we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, *Cities Service Co. v. Dunlap,* 308 U.S. 208, as to conflict of laws, *Klaxon Co. v. Stentor Co.,* 313 U.S. 487, as to contributory negligence, *Palmer v. Hoffman,* 318 U.S. 109, 117. And see *Sampson v. Channell,* 110 F.2d 754. *Erie R. Co. v. Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties." (326 U.S. at p.p. 109-110.)

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*Holding that where a suit for equitable relief in a state court would be barred by the state statute of limitations, a federal court, in a diversity case, ought not to grant such relief.

The foregoing philosophy has direct application here.

Under any of the foregoing concepts, it is respectfully urged that the District Court erred in granting the motions for summary judgment in the Nevada cases.

V.

THE DISTRICT COURT ERRED, IN TWO OF THE NEVADA CASES, IN INCREASING, BY IMPROPER ADDITUR THERETO, THE AMOUNTS OF THE GENERAL VERDICTS RETURNED BY THE JURY.

In the Nollenberger and Matlock cases respectively, the District Court denied plaintiff's motion for new trial made upon the ground, among others, of inadequacy of damages but, by additur, nevertheless increased the amounts of the general verdicts returned by the jury from $114,655 to $171,702, in the one case, and from $157,969 to $207,420, in the other. (See Memorandum on Motions for New Trial, R. (Nollenberger) 494.) This was done ostensibly pursuant to the provisions of Rule 49(b), Fed. Rules Civ. Proc. In so doing the Court invaded the province of the jury and deprived United of its right to a trial by jury as to the issue of damages, all in contravention of the 7th Amendment to the Constitution.

At the outset, the court expressly and quite properly instructed the jury that "you are called upon to fix an amount of damages to plaintiffs in your verdict which is fair and just, regardless of the amount." (Rep. Tr. (Jan. 15, 1963) p. 654; Rep. Tr. (Jan. 23, 1963) p. 538) Also, the court properly instructed the jury that it *might* take into consideration, in arriving at its verdict, such matters as the life expectancy of the deceased, his potential earning capacity during the period of such expectancy and the other customary and

relevant factors which are traditionally associated with wrongful death cases.

The complete documentation of the court's action under the present head, including the charges to the jury just mentioned, is set forth in Part V of the Appendix.

The District Court then proceeded to underline the instruction just referred to, and in effect informed the jury that they *must* take such factors into consideration, by propounding to them, over the objections of United, specific interrogatories as to certain factors which it deemed relevant. (See Appendix, Part V, Interrogatories propounded in Nollenberger and Matlock, the answers to Interrogatory 13, in each case, constituting the general verdict; 2nd United's objections thereto.

Then, deeming the general verdicts in the two cases inconsistent with the answers to the general interrogatories within the purview of Rule 49(b) and on the theory that the jury was required to compute mathematically its general verdict from the answers to the special interrogatories, the court proceeded to recompute the general damages using the testimony of plaintiff's actuary, thus arriving at the additive totals above referred to. (See Appendix, Part V, Court's computations in Nollenberger and Matlock.) In doing this, the court awarded the plaintiffs, among other things, compound interest upon its allocation of the potential earnings of their respective decedents from date of death to date of *trial*, R. (Nollenberger) 494,507. These were matters which could never have been properly submitted to the jury, for the date of trial is no concern of theirs.

The basic vice of the court's action was this: It *compelled* the jury to take into consideration factors which, under the law and, indeed, under the court's own instructions, it was within that body's discretion to

consider or not, and to what extent, it saw fit. What was permissive thus became compulsive. The court, in effect, held that a general verdict must be computed mathematically by the jury from specified components. Then, having *required* the jury to assess the various elements, the District Court applied, to the results of their channeled labors, a mechanical arithmetic process, the result of which was an end product wholly at variance with the jury's own conclusion as to what the ultimate general damages should be. (See respective answers to Interrogatory 13.)

It is respectfully urged that the District Court's actions in the particulars under discussion were a misuse of the special interrogatory procedure under Rule 49(b); that they included a cross-examination of the jury in advance as to matters properly, under law, committed to the discretion of that body; that they required that a general verdict be computed mathematically and with mechanical precision, thus completely ousting any exercise of a proper discretion on the part of the jury; and that they resulted in an additur imposed by the trial court in contravention of United's right to a jury trial guaranteed it under the Seventh Amendment. *Dimick v. Schiedt,* 293 U.S. 474; and see also, as to the impropriety of mathematically computing the damages in a wrongful death case, *Hinsdale v. New York, N.H. & H. R. Co.,* 31 N.Y.S. 356; *Union Pac. R. Co. v. Dunden,* 37 Kan. 1, 14 Pac. 501; cf. *Emery v. Southern Calif. Gas Co.,* 72 Cal.App.2d 821, 165 P.2d 695.

We now turn to the last assignment: error in the denial of the motions made in each case for a new trial.

VI.

THE DISTRICT COURT ERRED, IN EACH OF THE 31 CASES, IN DENYING UNITED'S MOTION FOR NEW TRIAL.

Following the entry of judgment in each of the 31 cases, United moved for a new trial. (Appendix, Part II, record citations, all cases.) Each of these motions were denied. (Id.) In so doing, the District Court erred in each case for each and all of the reasons hereinabove set forth as being applicable to such case or to the group of cases to which such case belongs.

CONCLUSION.

For each and all of the reasons hereinabove set forth it is respectfully urged that each of the judgments appealed from (1) in favor of the respective passenger-plaintiffs and against United, and (2) denying indemnity to United from the Government and awarding contribution to the Government from United in any amount, should be reversed.

Respectfully submitted,

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Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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